Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ and STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of the State Education Department of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a prior administrative decision awarding a parent reimbursement for the cost of tuition at a non-State approved private school lawfully constitute a "change in placement" within the meaning of 20 U.S.C. § 1415(j) and this Court's decision in *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 285 (1985), for the purpose of determining a child's "current educational placement" under 20 U.S.C. § 1415(j)?

2. Is a public school district obligated to reimburse the parents of a child with a disability prospectively for the cost of private school tuition during the pendency of proceedings under the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400, *et. seq.*, based solely on a prior award of tuition reimbursement in the absence of a finding that the agency's current individualized education program failed to make a "free appropriate public education" for the year in question, as required by 20 U.S.C. § 1412(a)(10)(C)(ii) and the decisions of this Court under *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)?

3. Does the sovereign immunity waiver under 20 U.S.C. §1403 provide remedies to a municipal corporation for systematic violations of federal law?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed (App.1a-17a) is reported at 290 F.3d 476 (2d Cir. 2002) and unofficially reported at 36 IDELR 261 (LRP). The Order of the United States Court of Appeals denying Petitioner's motion for a rehearing (App. 36a-37a) is not reported. The Decision and Order of the United States District Court for the Northern District of New York from which the appeal was taken (App. 18a-35a) is reported at 137 F. Supp. 2d 83 (N.D.N.Y. 2001).

The Decision of the State Review Officer of the State Education Department of the State of New York (App. 38a- 48a) which gave rise to the federal court action is reported as *Application of a Child with a Disability*, Appeal No. 99-100 (3/16/2002) on the official New York State Education Department Website at www.seddmznt.nysed.gov/sro/99-100.htm.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on May 13, 2002. A petition for panel rehearing and a petition for rehearing en banc was denied on September 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the application of the Individuals with Disabilities Education Act ("IDEA"), codified at 20 U.S.C. §§ 1400 through 1487, particularly §§ 1412(a), 1415(j) and 1403, and regulations of the

United States Department of Education set forth at 34 C.F.R. Part 300, *et. seq.*, and particularly § 300.514(c). The pertinent text is set out in the Appendix herein.

STATEMENT OF THE CASE

The decision below creates new federal obligations requiring public school districts (LEAs) to reimburse the parents of a child with a disability for the cost of private school tuition before a finding by a court or state level review officer that the student's current individualized education program ("IEP") failed to offer the student a free appropriate public education ("FAPE"). The availability of tuition reimbursement as an equitable remedy, **after** a finding that a public agency failed to offer a FAPE, has been addressed by this Court in *School Committee of Burlington v. Dept. of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).

1. The Statutory Scheme

The IDEA provides federal funds to states that agree to provide a FAPE in the least restrictive environment ("LRE") to disabled children. *See Board of Educ. v. Rowley*, 458 U.S.176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Fundamental to the IDEA is the IEP, a detailed annual plan of special education that includes goals designed to meet the student's educational needs. *See* 20 U.S.C. §§ 1414(d)(1)(a); 1414(d)(4)(A)(i); 8 N.Y.C.R.R. § 200.4(d)(2). The IEP provides benchmarks to assess a student's progress and, as necessary, the need to revise the IEP. *See* 20 U.S.C. ' 1414(B)(i); 8 N.Y.C.R.R. § 200.5(a)(2).

The grant of funds under the IDEA is conditioned upon a state's assurance that it has in effect policies and procedures to ensure that a FAPE is available to all children with disabilities, 20 U.S.C. § 1412(a)(1), and that:

> to the maximum extent appropriate, . . . children with disabilities . . . are educated with children who are not disabled and that . . . separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5). While its goal is for public schools to provide students with disabilities an appropriate education in the regular public schools, the IDEA authorizes school districts to place children in private schools, where appropriate and least restrictive. 20 U.S.C. § 1412(a)(10)(B). The private school must be "under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and meet the educational standards of the State Educational Agency." 20 U.S.C. §1412 (a)(11)(A)(ii). In addition, a private school must comply with State regulations to be approved to provide special education. *See* N. Y. Educ. L. §§ 4401.2 (e), 4402.2 (b)(2) (2002).

States must also ensure that parents and local school districts have access to the procedural safeguards of the IDEA. 20 U.S.C. §§ 1415, 1412(a)(6), 1412(a)(10)(C). These safeguards include the parents'

right to request hearing to review any matter involving the provision of FAPE. 20 U.S.C. §1412(a)(6). Adverse decisions may be appealed in court. 20 U.S.C. §1415(i)(1)(A). During these proceedings, LEAs must maintain a disabled child in his or her "then-current educational placement" unless the State or local educational agency and the parents otherwise agree. 20 U.S.C. § 1415(j). The legislative history of the Act states that the pendency provision was included to ensure that **"any revision of the student's IEP"** be done only with the "agreement of the parents... in order to ensure that services to the child are not arbitrarily curtailed or modified." 1975 U.S.C.A.N.P.L. 94-142 p. 1435. On the issue of agreement, a 1999 amendment to the federal regulations now provides that:

> If the decision of a hearing officer in a due process hearing conducted by the SEA or State Review official in an administrative appeal agrees with the child's parents that **a change in placement is appropriate, that placement must be treated as an agreement** between the State or local agency and the parents for the purposes of paragraph (a) of this section.

34 C.F.R. §514(c) (emphasis added). Parents may reject an IEP, remove their child from a public school and enroll the child in a private school while proceedings are pending. In the interim, they assume the "financial risk" for the student's tuition. *Burlington*, 471 U.S. at 373-74.

In *Burlington*, this Court held that parents who enroll their child in a private school during the pendency of proceedings may be awarded reimbursement for tuition if it is determined that the IEP proposed by the

LEA failed to provide a FAPE. *Burlington*, 471 U.S. *passim*. Eight years later, this Court further held that the remedy of tuition reimbursement is available even if the private school selected by the parents is not state approved. *Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).

In 1997, Congress amended the IDEA and specifically authorized an award of tuition reimbursement as a remedy at law, providing that:

> If the parents of a child with a disability enroll a child in a private school **without the consent of the public school**, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment **if the court or hearing officer finds that the agency had not made a FAPE available to the child in a timely manner prior to that enrollment**.

20 U.S.C. §1412(a)(10)(C)(i)(emphasis added). At the same time, Congress also afforded public school districts explicit protection against such liability by requiring states to ensure that nothing in the IDEA would "require a local educational agency to pay for the cost of education . . . at a private school **if the LEA made a [FAPE] available to the child and the parents elected to place the child in such private school or facility**." 20 U.S.C. §1412(a)(10)(C)(ii) (emphasis added). Under the amendments, reimbursement could also be reduced or denied upon a finding of Aunreasonableness with respect to actions taken by the parents" and other considerations. 20 U.S.C. §1412(a)(10)(C)(iii).

2. Facts

Petitioner Board of Education of the Pawling Central School District ("District") is a public school district in the State of New York. Respondents Steven and Yvonne Schutz are the parents of Kevin Schutz, an infant. Kevin Schutz first enrolled in the District's public schools as a kindergarten student in 1991. In 1993, Kevin was classified as a student with a learning disability. For the 1993-1994 and 1994-1995 school years, Kevin received special education pursuant to IEPs prepared by the District's Committee on Special Education ("CSE").

The Schutzes objected to the IEP developed for Kevin for the 1995-96 school year and enrolled their son in the Kildonan School. Kildonan is a private school exclusively serving children with learning disabilities, which is not approved or accredited by the State of New York to provide special education. App. 39a. The Schutzes maintained their son at Kildonan at their expense for the 1996-1997 school year. In April 1997, the Schutzes requested an impartial hearing to obtain reimbursement for their son's tuition at Kildonan for the 95-96 and 96-97 school years, claiming that the District's IEP failed to provide a FAPE. At no time, did they request a change in Kevin's placement.

On September 4, 1997, the impartial hearing officer decided in favor of the Schutzes, concluding that the District had failed to make a FAPE available to Kevin and awarded reimbursement of tuition for both academic years. The hearing officer did not, however, direct the school officials to develop and implement an IEP placing Kevin at Kildonan. The District appealed to State Review Officer Munoz ("SRO") of the Respondent State Education Department of the State of New York,

arguing that the Schutzes' claim for tuition for the 1995-96 and 1996-97 school years, not filed until April 1997, should be barred under the doctrine of laches. SRO Munoz denied the District's appeal by Decision issued on September 8, 1998. The District did not seek judicial review of the SRO's decision. Consequently, the District reimbursed the Schutzes their tuition costs for the Kildonan School for both school years.

During those proceedings, the District prepared IEPs for the 1997-1998 and 1998-1999 school years. The Schutzes objected again, enrolled their son at Kildonan, and requested impartial hearings for tuition reimbursement for those school years, as well. Having not received a decision from the SRO with respect to the 1995-1996 and 1996-1997 IEPs, the District entered into a monetary settlement with the Schutzes to resolve their intervening claims in lieu of a hearing.

The District prepared a new IEP for the 1999-2000 school year which offered Kevin a program in the public school substantially different from those previously rejected. App. 58-a. Nevertheless, the Schutzes rejected the IEP again, enrolled Kevin at Kildonan and requested a new hearing to obtain tuition reimbursement for the 1999-2000 school year.

At the outset, the Schutzes requested that Kildonan be deemed Kevin's "then-current educational placement" to be maintained at public expense during the proceedings under the pendency provision. 20 U.S.C. § 1415(j). The District objected and argued that, as a non-State approved school, Kildonan could not constitute a "placement" under state or federal law. The District also argued that, consistent with this Court's rulings in *Burlington* and *Carter*, the parents would assume the financial risk during the pendency of new

proceedings, and that tuition reimbursement would only be available if the SRO found that the current year's (1999-2000) IEP failed to offer Kevin a FAPE, *See* 20 U.S.C. § 1412(a)(10)(C).

The impartial hearing officer denied the Schutzes' request on November 5, 1999.

3. The Proceedings Below

A. Appeal to the State Review Officer. The Schutzes appealed the denial to SRO Munoz. In his decision issued on March 16, 2000, SRO Munoz sustained the appeal and directed the District to reimburse the Schutzes for the cost of Kevin's tuition at the Kildonan School prospectively during the pendency of the administrative proceedings to determine the sufficiency of the District's 1999-2000 IEP.

Considering whether the SRO's prior decision, issued in September 1998, which granted the Schutzes tuition reimbursement for the Kildonan School for the 95-96 and 96-97 school years could be considered a "mutually agreed upon placement" for Kevin, SRO Munoz acknowledged the long-standing distinction between a tuition reimbursement order and a "change of placement":

> the prior decisions by the State Review Officer have held that a decision by an impartial hearing officer or the State Review Officer to award **tuition reimbursement** to the parents of a child who has been unilaterally placed in a private school by the parents should not be construed as either a school district or State Education Department

> determination to place the child in that school, thereby changing the child's **placement** to the private school.

App. 45-a (emphasis added). Although seemingly dispositive of the issue, SRO Munoz overruled this long-standing precedent in light of the 1999 regulation governing pendency placements which provides that:

> If the decision of a hearing officer in a due process hearing conducted by the SEA or State Review official in an administrative appeal agrees with the child's parents that a change in placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for the purposes of paragraph (a) of this section.

34 C.F.R. §514(c). SRO Munoz relied on the comments of the U.S. Department of Education accompanying the regulation, which state that 34 C.F.R. § 300.514(c) was

> based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision **is in agreement with parents that a change in placement is appropriate**, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals,

and cited three federal cases in support. App. 46a (emphasis added).

Contrary to the precedent distinguishing **reimbursement** from **placement** orders, SRO Munoz concluded that the new regulation, and particularly the commentary, required him to find that the prior decision, awarding tuition reimbursement for the 95-96 and 96-97 school years constituted a "change in placement" for purposes of determining the student's "then-current educational placement" under 20 U.S.C. § 1415(j) for the 1999-2000 school year. SRO Munoz relied solely on the fact that "the three decisions which were referenced in the Federal Register explanation all involved tuition claims." App. 47a. SRO Munoz did not address the fact that Kildonan was not a State-approved facility where neither the state educational agency nor the school district could lawfully place the student.

B. Proceedings in District Court. On July 17, 2000, the District commenced an action in the United States District Court for the Northern District of New York challenging the determination of SRO Munoz pursuant to the IDEA and seeking supplemental remedies under 42 U.S.C. §§ 1983 and 1988. Jurisdiction of the District Court was based on federal question jurisdiction pursuant to 28 U.S.C. § 1331 and the specific jurisdiction over IDEA claims provided by 20 U.S.C. §§ 1415(i)(B)(2) and 1403(a).

On motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the District Court dismissed the Complaint in its entirety. On the merits, the District alleged that SRO Munoz violated the IDEA by requiring it to reimburse tuition prospectively without determination that the District's 1999-2000 IEP failed to offer the student a FAPE. The District Court further concluded that 20 U.S.C. § 1415(j) obligated the District "to continue Kevin's placement at Kildonan until it is

changed in accordance with the IDEA," and that the obligation required the District to pay Kevin's tuition costs prospectively "during the pendency of the ongoing administrative review." App. 30a. On the District's argument that prospective tuition reimbursement without a prior finding of a denial of FAPE was contrary to § 1412(a)(10)(C), the District Court concluded that the section applied "only to the situation where the parents have not yet successfully challenged a proposed IEP." App. 29a.

The District Court dismissed the District's claims and entered an order directing the District to continue to pay Kevin's tuition at Kildonan for the 2000-2001 school year and thereafter "during the pendency of the ongoing dispute over the proposed IEP." App. 30a.

C. Proceedings in the Court of Appeals. The District appealed the decision of the District Court to the Court of Appeals for the Second Circuit. In an opinion dated May 10, 2002, the Court of Appeals affirmed the order of the District Court in its entirety.

The Court of Appeals agreed with the District Court that the change in federal regulations at 34 C.F.R. § 300.514(c) was intended to effectuate this Court's 1985 decision in *Burlington*. Regarding the interplay between the pendency provision at §1415(j) and the 1997 statutory provision now governing awards of tuition reimbursement at §1412(a)(10)(C), the Court of Appeals agreed with the District Court that the latter were intended "to address those situations where the parents have not yet successfully challenged a proposed IEP." App. 12a. According to the Court, "once the parents' challenge succeeds, as the Schutzes did here in 1997, consent to the private placement is implied by law and the requirements of §1415(j) become the

responsibility of the school district." App. 13a. In response to the District's arguments, the Court concluded that "[t]o read this provision in the manner recommended . . . by the District would eviscerate the very protection Congress sought to provide through the enactment of § 1415(j)." App. 12a. Regarding the fact that the Kildonan School is not approved for special education by the New York State Education Department, the Court below relied on this Court's conclusion in *Carter* that to add to the statute a requirement that once "a school district [that] fails to provide a FAPE, parents' choice must satisfy rigorous District-approved criteria" would "defeat the statutory purpose by leaving children without an appropriate educational choice." App. 12a. In sustaining the orders below, the Court of Appeals referred to the observation of this Court in *Carter* that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* Thus, the Court of Appeals held that the District Court's decision was

> in conformity with the understanding of *Burlington* manifested in the agency's 1999 amendments to the federal regulation and in tandem with the holdings in *Susquenita*, *Murphy* and other cases, that an order of reimbursement predicated on a finding that a proposed IEP is inappropriate for a child constitutes a change in the child's current educational placement for purposes of interpreting the pendency placement provision, at §1415(j) of the IDEA.

App. 13a.

The Court of Appeals also agreed that the Eleventh Amendment required dismissal of the cause of action under 42 U.S.C. § 1983, finding that the District was afforded notice and a hearing satisfying constitutional requirements before it was ordered to pay the student's tuition under the pendency provision, and further concluded that the waiver of sovereign immunity under 20 U.S.C. § 1403 did not embrace remedies under § 1983 to enforce federal statutory rights under the IDEA. App. 5a-6a. The District filed a petition for rehearing with the Court of Appeals on May 28, 2002. The request was denied on September 18, 2002. App. 36

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law under the IDEA which have not been addressed by this Court. The decision below relies heavily on the decisions of this Court in *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed.2d 385 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993) for its holding. Nonetheless, the decision below and its impact on the future implementation of IDEA and disbursement of limited funds intended to serve all children with disabilities[1] has implications that far transcend the issues addressed by this Court in *Carter* or *Burlington*.

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[1] *See* Rich Disabled Pupils Go to Private Schools at Public Expense, Levy Says", N. Y. Times, April 17, 2002, at B-7. According to the article, last year, the Board of Education for the New York City Public Schools spent $13million to reimburse the tuition of close to 1000 disabled children who attended private schools. Jeffords, J.The Hill, Keeping our Promise on Special Education, p. 1, September 4, 2002.

Resolution of these questions would serve to address the relationship, if any, between an award of tuition reimbursement and the pendency provision first addressed by the Court in *Burlington* and its effect on a future proceeding challenging a new IEP. This case provides an important opportunity for this Court to address the question left open after *Carter*: whether a one-time award of reimbursement for tuition at a private school automatically constitutes an agreed upon change of placement under the IDEA even though neither the public school, the SEA, or the SRO is authorized to place the child in that school under state and federal law.

The case is particularly important in view of the 1997 amendments to IDEA that not only codified tuition reimbursement as a remedy at law, but underscored the fact that the parents could be denied that remedy if their actions, as equal members of the IEP team, were unreasonable. By awarding tuition reimbursement prior to any review of the current year's offer of FAPE and without regard to the district's program, these decisions have upset the carefully constructed balance of interests between school districts that seek, in good faith, to provide students a FAPE and the parents who seek tuition reimbursement for enrollment in a private school that cannot be obtained through the IEP process. It also eliminates the fiscal protections Congress afforded to school districts when its IEP offers FAPE. 20 U.S.C. §1412(a)(10)(C)(i).[2]

An overriding question never addressed remains: under what grant of authority is an award of tuition reimbursement by a state level review officer an agreed

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[2] The majority of appeals to the State Review Office in New York involve claims for tuition reimbursement for private schools not approved by the SEA. www.seddmznt.nysed.gov/sro.

upon "change of placement," which requires a school district to pay the student's tuition at a school during the pendency of future proceedings where the LEA, the SEA, and the SRO are nonetheless prohibited from making such a placement in accordance with an IEP poses a fundamental question that the decisions below did not address? Petitioners urge this Court to grant the writ of certiorari to the United States Court of Appeals for the Second Circuit to address and resolve these questions.

I. AN AWARD OF TUITION REIMBURSEMENT BY A STATE REVIEW OFFICER CANNOT LAWFULLY CHANGE THE PLACEMENT OF A CHILD WITH A DISABILITY TO A NON-APPROVED PRIVATE SCHOOL.

In *Burlington*, this Court held that parents who place a child with a disability in a private school during the pendency of administrative proceedings may be awarded reimbursement for tuition costs in the event it is determined that the IEP proposed by local authorities failed to provide a FAPE as required by the IDEA. Eight years later, this Court further held in *Carter* that the remedy of tuition reimbursement is available even if the private school selected by the parents was not approved by the State to provide special education.

In *Burlington*, the Court commented upon the relationship between an administrative tuition reimbursement award and a child's current educational placement. Noting the statutory requirement (now codified at § 1415(j)) that disabled students be maintained in his or her "then current educational placement during pending administrative or judicial proceedings," and highlighting particularly that language which allows the State and parents to "otherwise agree"

to an alternative placement, the Court stated:

> As an initial matter, we note that the section calls for agreement by *either* the State *or* the local educational agency. The BSEA's decision in favor of the [parents] and the Carroll School placement would seem to constitute agreement by the State to the change of placement.

Burlington, 471 U.S. at 372. This comment is credited as a source of the 1999 amendment to 34 C.F.R. §300.514(c), which provides that a state level administrative decision agreeing with a child's parents that a change in placement is appropriate "must be treated as an agreement" between the State and parents within the meaning of § 1415(j) for determining a child's then current educational placement. *See*, *Federal Register*, vol. 64, No. 48, March 12, 1999, page 12615.

In *Burlington*, tuition reimbursement was granted with respect to a private school which was State-approved to provide special education to a student with a disability. Accordingly, the "agreement" to the change in placement which implicitly arose between the State and the parents by virtue of this Court's *Burlington* decision, and later under 34 C.F.R. § 300.514(c), involved an **approved** private school in which the child could be lawfully placed by school authorities. Thus, this Court's conclusion that, in addition to an award of tuition reimbursement, in a case involving a parents' unilateral placement in a state **approved** private school:

> where a court determines that a private placement desired by the parents was proper under the Act and that an IEP

> calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at pubic expense an IEP placing the child in a public school.

Burlington, 471 U.S. at 370, was consistent with IDEA's complex statutory scheme. In such a case, either a state level review officer or a court could simply direct the local school to write an IEP for the private school placement it could have, and should have, made in the first instance.

The question not addressed by this Court in *Burlington* or its progeny is whether an award of tuition reimbursement to the parents of a child with a disability in a **non-State approved** private school effects a "change in placement" to the private school, where both the state and the local public school district are strictly prohibited under state and federal law from making such a placement. *See* 20 U.S.C. §§ 1412(a)(11), 1414. On this unresolved question, the Court of Appeals found that a prior award of tuition reimbursement constitutes "consent to the private placement ... implied by law." App. 12a. The courts below never addressed the fact that, unlike the facts of *Burlington*, neither the SRO, the NYSED, nor the District could lawfully place Kevin at Kildonan, a non-approved school, in accordance with 20 U.S.C. §§ 1412(a)(10)(B) and 1414. As it stands, the IEP itself, recognized as the "centerpiece of the statute's education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988), and the "modus operandi of the Act," *Burlington*, 471 U.S. at 368, is now lost by the Courts' application of the pendency provision. While the District

must continue to pay the cost of Kevin's attendance at Kildonan under the decisions below, it can never, as a matter of law, develop and implement an IEP to place him there.

Under federal law, SEAs cannot simply place a child into any private school. Rather, the state must first determine "whether such schools and facilities meet standards that apply to state and local educational agencies and that children so served have all the rights they would have if served by such agencies." 20 U.S.C. §1412(a)(10)(B)(ii); 34 C.F.R. §300.401. Even with parental consent, neither a state educational agency nor a local school authority can lawfully place a child with a disability into a private school which has not met all the preconditions for state approval. App. 39a.

Unlike a placement, an award of tuition reimbursement is available to parents upon the simple finding that the public school's IEP did not offer FAPE, without regard to the fact that the private school "does not meet the State standards that applies to education provided by the SEA and LEAs." 34 C.F.R. §300.403(c). Until the March 2000 decision which gave rise to the instant proceedings, the SRO in New York repeatedly held that an award of tuition reimbursement does not change a child's pendency placement since "a tuition award is not a determination that a student should be placed in a particular school." App 45a. Even after his decision, the courts below did not confront the fact that an award of tuition reimbursement for a nonapproved private school is not the equivalent of a finding that such school meets the mandated standards governing placements set forth at 20 U.S.C. § 1412(a)(10)(B)(ii).

Thus, the holding of the Court of Appeals raises serious issues concerning the application of the IDEA

and its overarching goal of providing disabled children with FAPE in either public institutions or approved private schools that meet state educational standards and serve under the supervision of the SEA and the LEA, which is charged with monitoring the placement of any student it places there. As a result, parents can now obtain a "placement" at public expense through litigation which cannot be offered by the public schools pursuant to an IEP. The relief awarded here is extraordinary, considering that this de facto placement will continue "until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which [the Schutzes] choose not to appeal, or by a court." App. 13a.[3] As this Court recognized in *Burlington*, the process of administrative and judicial review is "ponderous" and can take "years" to conclude. *Burlington*, 471 U.S. at 370. In accordance with this decision, a child with a disability may spend years in a private school without any review, whatsoever, of the student's program, his progress, or assessment of his special educational needs, all at great public expense, all while beyond public oversight.

The Court of Appeals erred in extending the dicta of *Burlington* and 34 C.F.R. § 300.514(c) to effect a *de facto* change of placement to a non-approved private school based on an "implied" consent which could never, in practice, be offered by either the SEA or the public schools.

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[3] This proceeding was commenced by the Parents in September 1999. The SRO's decision in November 2001 invalidating the District's IEP for the 1999-2000 school year is on appeal and, as of December 2002, is being transferred to the State Supreme Court, Appellate Division.

II. REIMBURSEMENT FOR PRIVATE SCHOOL TUITION PRIOR TO A FINDING THAT THE SCHOOL DISTRICT FAILED TO OFFER A FAPE FOR THE CURRENT SCHOOL YEAR CONFLICTS WITH DECISIONS OF THIS COURT AND THE 1997 AMENDMENTS TO IDEA.

This case presents a compelling question of federal law concerning the interrelationship between a child's right under 20 U.S.C. § 1415(j) to remain in the "then current education placement" at public expense during the pendency of proceedings challenging the adequacy of a proposed IEP and the financial protections provided under 20 U.S.C. §1412(a)(10)(C)(i) to a LEA that makes a FAPE available to that child for the current school year and throughout the years of litigation. If a child's "then current educational placement" is in a private school, to what extent may the LEA be directed to maintain that placement during the pendency of those proceedings by reimbursing the parents prospectively for tuition costs **prior** to any finding that the agency's IEP for the current year failed to make a FAPE available?

The Court of Appeals concluded that LEAs must reimburse parents prospectively for tuition costs during such proceedings where a private school becomes the disabled child's "then current placement," notwithstanding the absence of any finding that the agency failed to make a FAPE available to the child for the current year. In this respect, the decision goes far beyond the decisions of this Court and the IDEA.

The availability of tuition reimbursement as a remedy for parents who incur the cost of private schooling because of a public school's failure to offer a

FAPE was first determined by this Court in *Burlington*. From the start, tuition reimbursement was characterized as a form of relief available only **after** a finding had been made that the IEP offered failed to offer a FAPE. The *Burlington* Court itself framed the issue as whether courts possessed "the power to order school authorities to reimburse parents for their expenditures on private school special education for a child **if the court ultimately determines that such placement, rather than the proposed IEP, is proper under the Act,**" (*Burlington*, 471 U.S. at 369) (emphasis added), and characterized reimbursement as a "post hoc determination of financial responsibility," *id.* at 371.

On the merits, this Court decided that "appropriate" relief to parents under the Act might include both a prospective injunction directing school officials to develop and implement at public expense an IEP placing the child in a private school and retroactive reimbursement of past tuition costs, but only "[i]n a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate." *Id.* at 370. However, parents placing a child in a private school during the pendency of administrative or judicial proceedings challenging the sufficiency of a proposed IEP "do so at their own financial risk" since "[i]f the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period." *Id.* at 374.

Unquestionably, this Court's decision in *Burlington* established that reimbursement for private school tuition was a remedy only available after a prior finding had been made that the IEP offered by the district failed to provide a FAPE. This principle was

later reaffirmed by this Court in *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). In *Carter*, this Court confirmed that tuition reimbursement was available as a remedy to parents even if the unilateral placement was in a private school not meeting State standards, provided that the IEP proposed by the public school was first determined to be "inappropriate" and the services offered at the non-approved private school were otherwise "appropriate." *Id.*

Addressing the potentially "significant financial burdens on States and school districts" associated with such awards, the *Carter* Court reassured the LEAs that such costs could be avoided:

> [P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give a child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Id. at 15. The import of the *Burlington* and *Carter* decisions is clear: local public schools cannot be directed to provide tuition reimbursement for a private school unless and until it has been determined that the IEP annually prepared by the public school failed to offer a FAPE.

The *Burlington-Carter* doctrine was incorporated into the IDEA by Congress in 1997, (20 U.S.C. § 1412(a)(10)(C)). Payment for the education of

children enrolled in private schools without the consent of or referral by the public agency was, for the first time, authorized by statute which provided:

> (i) In general
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

Id. From this general assurance, § 1412(a)(10)(C) specifically authorized an award of private tuition reimbursement only "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C.§ 1412(a)(10)(C)(ii). The new statutory provision is easily reconciled with the amendment to the federal regulations which now provides that:

> If the decision of a hearing officer in a due process hearing conducted by the SEA or State Review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

34 C.F.R. § 514(c).

As cited in the commentary, both *Susquenita School District v. Raelee S.*, 96 F.3d 78, 84 (3d Cir. 1996) and *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. 1990), involved cases where a school district sought to avoid liability for tuition by appealing the order of the state level review officer which was based on a finding that the district had failed to make a timely offer of FAPE available to the student for the year in question. To be consistent with the statutory provision at 20 U.S.C. §1412(a)(10)(C), these cases can only be read to establish a district's obligation to pay tuition, despite an appeal, where the SRO determines, after a full hearing, that the District failed to offer a FAPE for the year under review. Even the commentary supports that conclusion when it stated that "[the pendency provision] only shifts responsibility for maintaining the parent's proposed placement to the public agency **while an appeal is pending** in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate." 64 Fed. Reg. 12614 (Mar. 12, 1999) (emphasis added). In view of the statute, the commentary must be read to support a limited application of the pendency provision applicable only in cases where a district appeals a current year award of tuition reimbursement. The decisions below focused only on the first part of the commentary, while omitting any discussion of the remainder of the same commentary.

The holding below goes well beyond the decisions of this Court and the plain language of the statute. The assurances of financial protection provided to LEAs in *Carter* have been retracted: a public school which proposes an IEP for the current school year that makes an FAPE available to a child with a disability

presently attending a private school must, nevertheless, prospectively pay the student's tuition there during the pendency of new proceedings challenging another IEP. As the case works its way through the lengthy review process, taxpayers must finance a private education which may later be determined to have been unnecessary upon a finding, years later, that the district's IEP for the year under review offered a FAPE. That the IEP may eventually be vindicated after years of litigation is of small comfort to a public school ordered to pay years of private school tuition which, in all likelihood, cannot be recovered from the parents after those proceedings end.

The holding below confuses the obligation to maintain the "then current educational placement" of a disabled child under § 1415(j) with the obligation to continue to pay the student's tuition there. Nothing in § 1415(j) or in this Court's precedent establishes that the obligation to maintain the "then current educational placement" includes an obligation by public schools to make prospective payments of tuition where the parent elects to keep the child in a private school during the pendency of a new proceeding. In reaching its decision, the Court of Appeals essentially overruled its prior decision recognizing the important distinction between **payment** and **placement** in such cases, *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982), which was followed in *Mayo v. City of Baltimore*, 40 F. Supp. 2d 331 (D. Md. 1999), after the 1997 amendments (emphasis added).

Reading such an obligation into § 1415(j) is contrary to the IDEA and not supported by *Burlington-Carter* or § 1412(a)(10)(C). Rather than enforcing the post hoc remedy envisioned by Congress, the decisions below create a roadmap for obtaining tuition for a

private school and the equivalent of a placement only attainable through costly litigation that cannot be obtained through the overriding process of IEP development, carefully constructed under the IDEA. *See* 20 U.S.C. §1414. Petitioner urges this Court to fully examine the underpinnings of the IDEA and the impact of this decision on a major piece of federal legislation.

III. THE AVAILABILITY OF § 1983 REMEDIES FOR VIOLATIONS OF THE IDEA UNDER ITS SOVEREIGN IMMUNITY WAIVER SHOULD BE ADDRESSED

The District's Complaint included claims against the New York State Education Department and SRO Munoz, in his official capacity, under 42 U.S.C. §§ 1983 and 1988. The District's § 1983 claim sought declaratory and injunctive relief, including a declaration that the State Defendants' order that the District prospectively pay the Schutzes' tuition prior to any finding that its 1999-2000 proposed IEP denied the student a FAPE violated its right to due process. On appeal, the District also sought relief from the preliminary injunction issued by the District Court, which required the District to continue to make tuition payments during the pendency of the ongoing dispute.[4]

The District Court concluded that the District's § 1983 claims were barred by the sovereign immunity doctrine of the Eleventh Amendment. The Court below agreed with respect to any retrospective relief sought by the District. The Court, however, acknowledged that

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[4] Under the decision of the Court of Appeals, a District owes tuition automatically for subsequent years as long as an underlying proceeding for a prior year is pending. Thus, as in this case, the parents are not required to challenge a current year's IEP as a precondition to an award of tuition reimbursement.

the District's request for prospective injunctive and declaratory relief against the State under § 1983 would not be barred by the Eleventh Amendment, although it held that such relief was unavailable insofar as it would "violate the IDEA's statutory provisions and implementing regulations." App. 5a -7a.

This case presents an opportunity for this Court to settle unresolved questions of law relating to the availability of § 1983 claims as a means of remedying violations of the IDEA by a State agency which receives federal funds under the Act to ensure proper implementation of the IDEA.

The threshold question whether § 1983 provides remedies for violations of the IDEA presents an unresolved issue which has created a split in the circuits. *Compare Marie O. v. Edgar*, 131 F.3d 610, 622 (7th Cir. 1997) ("§ 1415(f) [of the IDEA] was enacted for the express purpose of ensuring that § 1983 claims would be available to enforce the IDEA", and *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995)(same), *with Sellers v. Sch. Bd.*, 141 F.3d 524, 530-32 (4th Cir. 1998) (§ 1415(f) does not allow plaintiffs to sue under §1983 for an IDEA violation), *and Padilla v. School Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000) (same). *See also Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2d Cir. 1983) (§ 1983 provides a remedy for a denial of IDEA's safeguards).

A further unresolved question is whether the State has expressly waived its immunity from suit under the Eleventh Amendment by accepting federal funds under the IDEA. In 1997, Congress amended 20 U.S.C. § 1403(a) to expressly provide that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal

court for a violation of this chapter." In addition to its broad waiver of sovereign immunity, 20 U.S.C.§ 1403(b) further provides that:

> [i]n a suit against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

Where §1983 provides an available remedy, the class of "persons" who may be sued includes municipalities and public entities "other than" states. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Combining that principle with the IDEA's broad waiver language under § 1403, the State accordingly stands in the same position as "any public entity other than a State," such as a school district, which is amenable to suit under § 1983. Therefore, to the extent a remedy for IDEA violations is available under § 1983, a genuine issue arises as to whether the State and its officials are amenable to such § 1983 claims in light of the broad statutory waiver of immunity articulated in 20 U.S.C. § 1403.

That Congress validly abrogated state sovereign immunity as a condition of receiving IDEA funds finds support in this Court's decision in *South Carolina v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). Moreover, the waiver of State sovereign immunity with respect to all remedies available under the IDEA is "unambiguous . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*, *quoting Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1,

17, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694, 707 (1981). The final question is whether a school district, as a municipal corporation, is a person under § 1983 both for purposes of liability, which is well established, and for purposes of relief for violations of systemic procedural violations of rights under federal law. *See Rural Water Dist. No. 1. v. City of Wilson*, 243 F 3d 1263, 1273-1275(10th Cir. 2001).

Accordingly, review by this Court is warranted to define the extent to which § 1983 is available as a means of remedying a state's systemic procedural violations of the IDEA, and to further delineate the extent to which States and their officials have waived their immunity pursuant to 20 U.S.C. § 1403(a) and (b) by accepting federal funds. The availability of remedies under §1983 may be pivotal to the District's capacity to obtain from the State those funds it has been required to pay from its local tax base in violation of the Act, as well as the attorney's fees it has incurred in seeking to enforce its statutory protection to be free from premature and unauthorized orders from the state to reimburse tuition payments for nonapproved private schools.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,
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(Any footnotes trail the end of each document.)
Docket No. 01-7541

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,
Plaintiff-Counter-Defendant-Appellant,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ,
Defendants-Counter-Claimants-Appellees,

STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of the State Education Department of the State of New York,
Defendants-Appellees.

January 10, 2002, Argued

May 10, 2002, Decided

COUNSEL:
KAREN S. NORLANDER, Girvin & Ferlazzo, P.C., Albany, NY, for Plaintiff-Counter-Defendant-Appellant.

JULIE M. SHERIDAN, Attorney General's Office, State of New York, Albany, NY, for Defendants-Appellees.

RosaLee Charpentier, Family Advocates, Inc., Kingston, NY, for Defendants-Counter-Claimants-Appellees.

JUDGES:

Before: SACK, KATZMANN and B. FLETCHER, * Circuit Judges.

OPINIONBY:
Betty B. Fletcher
OPINION:

B. FLETCHER, Circuit Judge:

The Board of Education of the Pawling Central School District (the "District") appeals from a final judgment of the United States District Court for the Northern District of New York (David N. Hurd, District Judge), granting defendants', (Steven and Yvonne Schutz ("the Schutzes"), the State Educational Department of the State of New York ("NYSED"), and State Review Officer ("SRO") Frank Munoz (in his official capacity)) motion to dismiss the District's complaint in its entirety. In its complaint, the District requests, inter alia, a declaratory judgment that SRO Munoz's order directing it to pay the Schutzes prospectively for the cost of their child's tuition violated the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., the Fourteenth Amendment, and 42 U.S.C. § 1983. The district court held: (1) that the State defendants were entitled to sovereign immunity as to plaintiff's 42 U.S.C. § 1983 claim, and, alternatively, a subdivision of the State could not sue the State for an alleged violation of due process; and (2) that plaintiff failed to state a claim for relief under the IDEA. We affirm.

I. BACKGROUND

A. Factual Background

The factual background of this case is undisputed, unless otherwise noted. Kevin Schutz, the child of Steven and Yvonne Schutz, first enrolled in the District's

public school system as a kindergarten student in 1991. Classified as a student with a learning disability in 1993, Kevin received special education pursuant to an "individualized education program" ("IEP") during the 1993-94 and 1994-95 school years. In the fall of 1995, the Schutzes objected to the proposed IEP for the 1995-96 school year, unilaterally removed Kevin from the District school, and enrolled him in the Kildonan School ("Kildonan"), a private school serving children with learning disabilities.

Unable to resolve the dispute over Kevin's IEP for the 1995-97 school years, in 1997 the Schutzes requested an impartial hearing, arguing that the District failed to provide a "free appropriate public education" ("FAPE"). In May 1996, the Schutzes sought reimbursement for the cost of tuition at Kildonan for both the 1995-96 and 1996-97 school years.

On September 4, 1997, the hearing officer issued an opinion in favor of the Schutzes, finding that the District failed to make a FAPE available to Kevin, and awarding reimbursement of tuition costs for both academic years. The District's appeal to SRO Munoz was denied, and the District subsequently reimbursed the Schutzes in compliance with Officer Munoz's order.

Subsequently the Schutzes objected to the IEPs proposed by the District for the 1997-98 and 1998-99 school years, and the District, prior to any hearings on the matter, reached settlements with the Schutzes pursuant to which the District reimbursed what appears to be either the bulk of, or all of, Kevin's Kildonan tuition for those years in return for the Schutzes agreement to withdraw their requests for administrative hearings. Despite the District's claim that its 1999-2000 IEP was substantially different from previous plans, the Schutzes also rejected the 1999-2000 IEP, re-enrolled Kevin at Kildonan, and subsequently requested a hearing

before an impartial hearing officer, seeking tuition reimbursement for the 1999-2000 school year.

B. The Proceedings Below

At the administrative hearing, the Schutzes sought to invoke the pendency provision, also known as the "stay put" provision, of the IDEA, at 20 U.S.C. § 1415(j), and requested an interim ruling that the District be ordered to pay Kevin's tuition at Kildonan during the pendency of the proceedings concerning their 1999-2000 school year reimbursement claim. n1 That request was denied by the hearing officer on November 5, 2000.

However, on appeal, SRO Munoz annulled the hearing officer's ruling in a decision issued on March 16, 2001, and ordered the District to "reimburse petitioners for their expenditures for their son's tuition at the Kildonan School during the pendency of the proceedings brought concerning the boy's educational placement for the 1999-2000 school year."

In response, the District filed an action in federal district court, pursuant to 20 U.S.C. § 1415(i)(3)(A), seeking to vacate SRO Munoz's order and requesting, inter alia, a declaratory judgment that SRO Munoz's order directing the District to pay tuition prospectively violated the IDEA and the Fourteenth Amendment, and equitable relief in the form of reimbursement for $21,000 in tuition already paid to the Schutzes.

The district court granted defendants' motions to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), and directed the District to "immediately comply" with SRO Munoz's order requiring prospective payment of tuition to the Schutzes.

We review here the district court's dismissal of the District's complaint.

II. DISCUSSION

A. Standard of Review

We review de novo the district court's dismissal of a complaint pursuant to Rule 12(b)(6). Abramson v. Pataki, 278 F.3d 93, 99 (2d Cir. 2002). We must accept as true the allegations contained in the complaint, and all reasonable inferences must be drawn in favor of the non-movant. Lee v. Bankers Trust Co., 166 F.3d 540, 543 (2d Cir. 1999).

B. The District's 42 U.S.C. § 1983 Claim

In its complaint, the District alleges, pursuant to 42 U.S.C. § 1983, that defendants NYSED and SRO Munoz, in his official capacity, deprived the plaintiff of its property without due process, in violation of the Fourteenth Amendment.

The district court dismissed this cause of action against both state defendants on the grounds of Eleventh Amendment immunity, and, alternatively, because the Fourteenth Amendment does not protect a political subdivision, such as the District, from actions taken by its own state.

We agree with the district court that the Eleventh Amendment requires dismissal of this cause of action. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (holding that the Eleventh Amendment protects both states and state officials, acting in their official capacity, from suits brought pursuant to 42 U.S.C. § 1983); accord Posr v. Court Officer Shield # 207, 180 F.3d 409, 414 (2d Cir. 1999).

On appeal, the District argues that § 1983 suits seeking prospective equitable relief are not barred by

the Eleventh Amendment. While true that suits for injunctive relief, even against state officials in their official capacity, are not necessarily foreclosed by sovereign immunity, Will, 491 U.S. at 71 n.10; Kentucky v. Graham, 473 U.S. 159, 167, n.14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985), plaintiff's complaint seeks in part retrospective relief which is precluded by the Eleventh Amendment. Ward v. Thomas, 207 F.3d 114, 120 (2d Cir. 2000) (noting that "retrospective forms of relief [are] barred by the Eleventh Amendment").

With respect to prospective tuition payments, moreover, there was no due process violation. The District was afforded notice and a hearing before being ordered to make them. The District also seeks reimbursement from the Schutzes n2, and prospective relief by way of declaratory judgment. Neither of these forms of relief is barred by Eleventh Amendment governmental immunity. As we explain in section II.C., below, however, any such relief would violate the IDEA's statutory provisions and implementing regulations. No § 1983 claim by the District can therefore lie for deprivation of its property without due process of law.

The District also makes what it concedes is a novel argument, namely, that by voluntarily receiving federal funds for IDEA programs, the state defendants expressly abrogated sovereign immunity against these suits under 20 U.S.C. § 1403(a) ("A State shall not be immune under the eleventh amendment to the Constitution . . . from suit in Federal court for a violation of this chapter."). This argument overlooks the obvious fact that § 1403(a)'s waiver of sovereign immunity extends only to claims brought pursuant to the IDEA, not claims brought pursuant to § 1983 or some other statute. Furthermore, a waiver of sovereign immunity must be "made either by invoking federal jurisdiction or by a

clear declaration, a 'stringent' test." McGinty v. New York, 251 F.3d 84, 92-93 (2d Cir. 2001) (quoting College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)). The IDEA contains no such clear statement with regard to § 1983 claims, and so cannot be construed as a waiver.

For these reasons, we agree with the district court that plaintiff's § 1983 claims must be dismissed.

We need not reach the district court's alternative holding that a subdivision of the State cannot sue the State for an alleged violation of due process.

C. The District's IDEA Claim

The IDEA "assures that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 68, 143 L. Ed. 2d 154, 119 S. Ct. 992 (1999) (quoting 20 U.S.C. § 1400(c)) (internal quotation marks and citations omitted). Under the IDEA, federal money is available to "assist state and local agencies in educating handicapped children," provided that the recipients of those funds comply with various provisions of the Act. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982); 34 C.F.R. § § 100.7, 104.61, (providing for federal monitoring of state and local compliance with the IDEA). Specifically, the IDEA provides for the creation of an IEP for each child as part of the child's FAPE. 20 U.S.C. § 1414(d). The IEP is collaboratively developed among parents of the child, educators, and other specialists. 20 U.S.C. § 1414 (d)(1)(B); Honig v. Doe, 484 U.S. 305, 311, 98 L. Ed. 2d 686, 108 S. Ct. 592

(1988) (noting that Congress "envisioned the IEP as the centerpiece of the statute's education delivery system for disabled children"). Recognizing that "educational policy and practice are traditional State and local functions," J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 65 (2d Cir. 2000), Congress left "implementation responsibilities" to the various state educational service agencies. Id.

Because the "individualized education program team," composed of parents and education professionals, 20 U.S.C. § 1414(d)(1)(B), cannot always agree on an appropriate IEP for the child, states are required to develop procedural safeguards to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Honig, 484 U.S. at 311-12.

In New York, parents who object to a proposed IEP may request an "impartial due process hearing" before a hearing officer. N.Y. Educ. Law § 4404(1). Subsequent to such a hearing, any aggrieved party may then appeal the decision of the hearing officer to the State Review Officer. Id. § 4404(2). The SRO's decision is final, and concludes the state administrative review. Upon issuance of a final administrative decision, however, a dissatisfied party has the right to bring a civil action in either federal or state court pursuant to the IDEA. 20 U.S.C. § 1415(i)(2)(A).

Although parents who "unilaterally change their child's placement during the pendency of [the above] review proceedings, without the consent of state or local school officials, do so at their own financial risk," Sch. Comm. of Town of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985), if ultimately successful in the review proceedings, they

are permitted to seek retroactive recovery of past tuition expenses. Id. at 372.

Furthermore, during the pendency of the due process review proceedings, parents are entitled to have the child "stay put" in his or her "current educational placement." 20 U.S.C. § 1415(j) n3; Honig, 484 U.S. at 323, 325 (finding that in "the language of [the stay put provision, Congress] unequivocally," intended to "strip schools of the unilateral authority they had traditionally employed" and that the provision "means what it says"). The meaning of the phrase "current educational placement," never expressly defined in the statute, is at the heart of the dispute between the parties in the case at bar.

In Burlington, the Court observed that an administrative decision in favor of the parents "would seem to constitute agreement by the State to the change of placement," 471 U.S. at 372; in other words, the decision would seem to constitute a "current educational placement." Other courts have followed this understanding of the relevant statutes. See, e.g., Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 (3d Cir. 1996) (holding that "the decision of the Supreme Court in Burlington established that a ruling by the education appeals panel in favor of the parents' position constitutes agreement for purposes of [the pendent placement provision]"); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 (S.D.N.Y. 2000) (Haight, J.) ("Once the SRO rendered its decision, there was an 'agreement' changing [the student's] pendent placement to Kildonan. From that date forward, the District is responsible for maintaining that placement.").

In the instant case, the district court found that the most recent final administrative ruling on Kevin's "current educational placement" occurred in September

of 1997, when the District lost its appeal from the hearing officer's determination that Kildonan was the current educational placement. For that reason, the district court ruled that the District was obliged to continue Kevin's placement at Kildonan, pursuant to 20 U.S.C. § 1415 (j), until such placement was changed in accordance with the relevant provisions of the IDEA. The district court ordered the District to comply with SRO Munoz's decision that it pay for Kevin's placement at Kildonan during the pendency of the administrative review.

As further support for its decision, and in the absence of an express definition for "current educational placement" in the text of the IDEA, the district court cited a recent amendment to the United States Department of Education regulations, found at 34 C.F.R. § 300.514(c), which states that the decision of a hearing officer agreeing with the position of the parents "must be treated as an agreement between the State and local agency and the parents [in making pendency determinations]." n4 See Murphy, 86 F. Supp. 2d at 358, n.3 (noting that the holding of Burlington was "later carried into the regulations as § 300.514"). The District responds that this change in the regulation defies, rather than codifies, the Supreme Court's holding in Burlington. We find that argument unpersuasive and agree with the district court that the change in regulations affirms, rather than undermines, the decision in Burlington and its progeny, cited supra. n5

The District argues against the interpretive conclusions reached by the district court on the ground that the foregoing analysis contravenes the statutory mandate of 20 U.S.C. § 1412(a)(10)(C)(ii) n6, allowing for payment to parents for the cost of a child's private school tuition "if the court or hearing officer finds that the agency had not made a free appropriate public

education available to the child in a timely manner prior to that enrollment." According to the District, § 1412(a)(10)(C)(ii) requires findings by a court or hearing officer, as a necessary predicate to an order of reimbursement, that the IEP offered by the school district is defective and that the parents are otherwise entitled to such an award. The District argues that the language of the pendency provision in the IDEA does not provide for reimbursement of private school tuition in contravention of § 1412(a)(10)(C)(ii), and that no finding was made here sufficient to trigger reimbursement under the aforementioned provision. n7 In other words, the District contends that the 1997 determination that the District's proposed IEP was inadequate, and the attendant order that the District pay for Kevin's placement at Kildonan, did not constitute a current educational placement.

The District's interpretation of the statutes involved is unconvincing. Under the District's interpretation of the relationship between § § 1412(a) and 1415(j), regardless of whether a student already receives tuition reimbursement for attendance at a private school, a school district's act of proposing a new IEP for a new school year abrogates the application of the "stay put" provision for the academic year covered by the proposed IEP. Such an interpretation would undermine entirely the pendency placement provisions of the IDEA, allowing a school district to avoid altogether § 1415(j) by the mere proposal of a new IEP. Murphy, 86 F. Supp. 2d at 366 ("To hold otherwise would mean that parents who could not afford a private placement would be forced to maintain their child in a public placement that an administrative decision held to be inappropriate.") (internal quotation marks and citation omitted). Both the statutory structure and the established notion that the stay put rule is a protective mechanism intended to

maintain the last proper placement during review of an IEP require us to reject the District's arguments.

As the district court found, the more reasonable interpretation is that § 1412(a)(10)(C)(ii) is addressed to those situations where the parents have not yet successfully challenged a proposed IEP. As discussed above, once the parents' challenge succeeds, as the Schutzes' did here in 1997, consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district. To read this provision in the manner recommended to us by the District would eviscerate the very protection Congress sought to provide through the enactment of § 1415(j). See Susquenita, 96 F.3d at 83 (finding that § 1415(j) represents "Congress'[s] policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved") (citations omitted).

We cannot endorse the District's argument that because Kildonan is not state accredited, reimbursement is improper. The Supreme Court rejected a similar argument in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12-13, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993). To add to the statute a requirement that, once a school district fails to provide a FAPE, parents' choice must satisfy rigorous District-approved criteria "would defeat the statutory purpose" by leaving children without an appropriate educational choice. Id. Moreover, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's

needs in the first place." Id. (citations and internal quotation marks omitted).

The District's fear that our interpretation of the IDEA requires it to reimburse the Schutzes perennially for their child's private education is misplaced. As the district court held in Murphy, our conclusion "does not mean that the District must fund [Kevin's] tuition at Kildonan for the remainder of his education," but rather that, "until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which [the Schutzes] choose not to appeal, or by a court, the District remains financially responsible." Id., 86 F. Supp. 2d. at 366.

We therefore hold, in conformity with the understanding of Burlington manifested in the agency's 1999 amendments to the federal regulations and in tandem with the holdings in Susquenita, Murphy, and other cases, that an order for reimbursement predicated on a finding that a proposed IEP is inappropriate for a child constitutes a change in the child's current educational placement for purposes of interpreting the pendent placement provision, at § 1415(j), of the IDEA.

For purposes of this case, we find that the decision by the hearing officer on September 4, 1997, awarding the Schutzes tuition reimbursement for the 1995-96 and 1996-97 school years, affirmed by the SRO's dismissal of the District's appeal on September 8, 1998, constituted a change in Kevin's current educational placement for purposes of the pendent placement provisions. In his September 1998 decision, SRO Munoz concluded that "[the District] could not meet its burden of proof that it provided an appropriate placement for the child for the 1995-96 and 1996-97 years" and that "the services [at Kildonan that the Schutzes] selected for their son were appropriate." Thus, he "agreed with the child's parents

that a change of placement [was] appropriate." 34 C.F.R. § 300.514. The District was therefore required to pay the costs of tuition at Kildonan during the pendency of the proceedings concerning the District's proposed IEP for the 1999-2000 school year.

III. CONCLUSION

We find the reasoning of the district court persuasive, in view of the language, structure, and purpose of the IDEA, the case law interpreting it, the agency's interpretation of it, and Congressional intent in establishing the Act's procedural safeguards, and hold that a final administrative decision by a state review board, agreeing with a parent's decision about their child's placement, constitutes a "placement" within the meaning of the pendent placement provision of the IDEA.

We affirm the district court's order dismissing the complaint and directing the District to continue to reimburse the Schutzes for the cost of tuition during the pendency of the instant dispute.

Footnotes

* The Honorable Betty B. Fletcher of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

n1 As to the merits of the Schutzes' claim for reimbursement, on August 17, 2000, the hearing officer found that the District made a FAPE available to Kevin for the 1999-2000 school year, and that the Schutzes improperly rejected it. For that reason, he denied their claim for reimbursement. At the time of the district court opinion in the case at bar, the Schutzes had appealed that decision to SRO Munoz. Subsequent to Judge Hurd's opinion in this case, SRO Munoz reversed

the determination of the hearing officer, in a decision dated November 9, 2001, finding that the District's proposed IEP was inadequate, and ordering the District to reimburse the Schutzes for tuition for the 1999-2000 school year. The parties have not informed us whether SRO Munoz's ruling is being, or has been, appealed by the District.

Regardless, we find this to be a classic instance of a harm "capable of repetition, yet evading review." Roe v. Wade, 410 U.S. 113, 125, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) (internal quotation marks and citation omitted). This "exception to the mootness doctrine" applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again . . . ." Spencer v. Kemna, 523 U.S. 1, 17, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998) (internal quotation marks and citations omitted); City of Los Angeles v. Lyons, 461 U.S. 95, 109, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (noting that the "capable-of-repetition doctrine applies . . . generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality"). In this case, unless the question of the District's obligation to pay Kevin's tuition pending resolution on the merits of a given proposed, and rejected, IEP is resolved by this court, the Schutzes legal claim for tuition payment during such pendency will likely be repeated, perhaps as often as every school year, and will continue to evade review. The usual requirement that an actual controversy exist at all stages of litigation, Roe, 410 U.S. at 125, does not preclude a decision by the court in cases, such as this, which precisely fit the so-called "capable-of-repetition" doctrine. Lyons, 461 U.S. at 109.

n2 The District brings suit against the Schutzes under § 1983 apparently on the theory that, although they are not themselves state actors like the other defendants, in obtaining tuition and tuition reimbursements they were acting in concert with other defendants who were acting under color of state law. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 941, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).

n3 The statute reads, in relevant part: "Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child . . . ." 20 U.S.C. § 1415(j).

n4 In full, the regulation provides: "If the decision of a hearing officer in a due process hearing conducted by the [State Education Agency] or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents [in making pendency determinations]." 34 C.F.R. § 300.514(c).

n5 The interpretive comment to a 1999 amendment to the regulation, at 34 C.F.R. § 300.514(c), explicitly states that it "incorporates [the] interpretation" found in Burlington, Susquenita, and Clovis Unified Sch. Dist. v. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990), that a "State review official's decision [] in agreement with parents that a change in placement is appropriate . . . constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals." 64 Fed. Reg. 12615 (March 12, 1999) (citing above listed cases).

n6 This 1997 amendment to the IDEA provides, in relevant part: "(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or the referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii).

n7 The District also argues that the district court ruling was in contravention of Zvi D. v. Ambach, 694 F.2d 904 (2d Cir. 1982), which, it claims, stands for the proposition that a reimbursement does not constitute a placement. In addition to the fact that Zvi D. predates the Court's decision in Burlington, and the consequent changes to the federal regulations, it is factually distinct from the case at bar. In Zvi D., the reimbursement was initially caused by a stipulation entered into by the parties without an administrative order and later continued when the hearing officer ordered reimbursement due to a procedural failure by the school board committee in charge of evaluating the complaining student's status. Id. at 907. Here, the reimbursement was ordered by the hearing officer after a determination that the proposed IEP was inadequate.

00-CV-1105

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,
Plaintiff,

v.

STEVEN SCHUTZ; YVONNE SCHUTZ; STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK; and FRANK MUNOZ, as the STATE REVIEW OFFICER OF THE STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK,
Defendants.

April 2, 2001, Decided

April 3, 2001, Filed

COUNSEL:
For Plaintiff: KAREN NORLANDER, ESQ., SCOTT M. GOODSPEED, ESQ., RUBERTI, GIRVIN & FERLAZZO, P.C., Albany, NY.

For State Education Department of the State of New York, Frank Munoz, as the State Review Officer of The State Education Department of the State of New York, Defendants: JAMES J. SEAMAN, ESQ., Asst. Attorney General, HON. ELIOT SPITZER, Attorney General of the State of New York, Office of the Attorney General, Albany, NY.

For Steven Schutz, Yvonne Schutz, Defendants: ROSALEE CHARPENTIER, ESQ., FAMILY ADVOCATES, INC., Kingston, NY.

JUDGES:
David N. Hurd, United States District Judge.
OPINIONBY:
David N. Hurd

OPINION:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On July 17, 2000, plaintiff Board of Education of the Pawling Central School District ("plaintiff" or the "District") commenced the instant action against defendants Steven Schutz and Yvonne Schutz (collectively, the "Schutzes"), and the State Education Department of the State of New York ("NYSED"), and Frank Munoz, as the State Review Officer of the State Education Department of the State of New York ("SRO Munoz") (collectively, the "State defendants"), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., ("IDEA"), and against NYSED and SRO Munoz pursuant to 42 U.S.C. § 1983.

Defendants now move to dismiss the complaint in its entirety. In addition, the Schutzes move for a preliminary injunction ordering the District to comply with SRO Munoz's order of March 16, 2000, requiring it to reimburse them for the cost of their disabled son's private school tuition, and for attorneys' fees. Oral argument was heard on November 27, 2000, in Albany, New York. Decision was reserved.

II. FACTS

This case arises out of a dispute over the education offered to the Schutzes' son, Kevin Schutz, a student in the District with severe dyslexia. There are no material facts in dispute in this case. n1

Kevin Schutz entered the District in kindergarten in 1991. Classified as a student with a learning disability by the District's Committee on Special Education ("CSE") in 1993, Kevin continued to attend its public schools, where he received special education and related services pursuant to Individualized Education Programs ("IEP") for the 1993-94 and 1994-95 school years. In September 1995, the Schutzes objected to the proposed IEP for the 1995-96 school year and unilaterally removed Kevin from school and enrolled him in the Kildonan School ("Kildonan"). Kildonan is a nationally renowned private school which serves children with learning disabilities.

The parties were unable to resolve the dispute over Kevin's IEP, and the Schutzes requested an impartial hearing in 1997, on the grounds that the District failed to offer Kevin a free appropriate public education ("FAPE"). In that hearing, the Schutzes sought reimbursement of Kevin's tuition at Kildonan for the 1995-96 and 1996-97 school years.

In a decision issued on September 4, 1997, the hearing officer found that the District had failed to make a FAPE available to Kevin and awarded the Schutzes tuition reimbursement for both years. Plaintiff appealed this decision to SRO Munoz solely on the grounds that the tuition award was barred by the doctrine of laches. SRO Munoz denied the appeal. The District reimbursed the Schutzes in accordance with the hearing officer's order.

The Schutzes objected to the IEPs proposed by the District for the 1997-98 and 1998-99 school years, and

the parties agreed to tuition reimbursement for those years. The Schutzes also objected to the IEP proposed by plaintiff's CSE for the 1999-2000 academic year, and re-enrolled Kevin at Kildonan. The Schutzes then requested an impartial hearing seeking tuition reimbursement for that school year.

At the outset of the hearing, the Schutzes sought to invoke the "stay put" provision of the IDEA, 20 U.S.C. § 1415(j). They requested that the hearing officer issue an interim ruling requiring plaintiff to pay Kevin's tuition at Kildonan during the pendency of the current dispute. The hearing officer denied the Schutzes' request on November 5, 1999. The Schutzes appealed to SRO Munoz, who sustained their appeal on March 16, 2000. SRO Munoz annulled the decision of the hearing officer and ordered the District to "reimburse petitioners for their expenditures for their son's tuition at the Kildonan School during the pendency of the proceedings brought concerning the boy's educational placement for the 1999-2000 school year." The District then commenced the instant lawsuit challenging this ruling. n2

III. STANDARD OF REVIEW

A. 12(b)(6) Motion To Dismiss

In deciding a Rule 12(b)(6) motion, a court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 'unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir.1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); see also Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995). However, conclusory allegations that merely state the general legal conclusions necessary to

prevail on the merits and are unsupported by factual averments will not be accepted as true. See, e.g., Clapp v. Greene, 743 F. Supp. 273, 276 (S.D.N.Y. 1990); Albert v. Carovano, 851 F.2d 561, 572 (2d Cir.1988).

IV. DISCUSSION

The State defendants move to dismiss the complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that it fails to state a cause of action upon which relief can be granted, and on the grounds that neither State defendant is a proper party under the IDEA. They also move to dismiss the complaint against SRO Munoz on the grounds of qualified and absolute immunity. The individual defendants also move to dismiss the IDEA claim against them pursuant to Fed. R. Civ. P. 12(b)(6). n3 Each of plaintiff's theories of relief, and the defendants' objections thereto, are discussed below.

A. Section 1983 Claims

1. Sovereign Immunity

The State defendants argue that plaintiff's Section 1983 claims must be dismissed as against the NYSED on the grounds of Eleventh Amendment immunity. This argument is correct. It is well-settled that Eleventh Amendment immunity applies to suits brought against the state pursuant to Section 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989); Grimes By and Through Grimes v. Sobol, 832 F. Supp. 704 (S.D.N.Y. 1993) (state education department immune from suit brought under Section 1983). Moreover, because SRO Munoz is sued only in his official capacity, this cause of action must be dismissed against him as well. See, e.g., Kentucky v. Graham, 473 U.S. 159, 169, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) (Eleventh Amendment immunizes state officials sued for

damages in their official capacity); K & A Radiologic Technology Svcs., Inc. v. Commissioner of the Dept. of Health of the State of New York, 189 F.3d 273, 278 (2d Cir. 1999) ("State officers, if sued in their official capacities for retrospective relief–are immunized by the Eleventh Amendment" from actions under Section 1983).

Plaintiff argues in opposition that the state has waived its sovereign immunity as to suits under Section 1983 by its voluntary acceptance of federal funds pursuant to the IDEA. The District correctly notes that the IDEA contains an express abrogation of sovereign immunity as to suits brought pursuant to it. See 20 U.S.C. § 1404(a). However, the District's argument confuses the distinct and separate causes of action alleged herein - specifically suits brought pursuant to the IDEA (to which the State defendants are not immune) as opposed to suits brought pursuant to Section 1983 (to which they are immune). Because the IDEA's abrogation of sovereign immunity only extends to claims brought pursuant to that statute, the State defendants are entitled to sovereign immunity as to the Section 1983 cause of action. n4

2. Due Process

Even assuming that New York had waived its immunity from suit under Section 1983, plaintiff's due process claims must be dismissed. It is utterly beyond cavil that the due process clause of the Fourteenth Amendment does not protect a political subdivision of a state from the action of its own state. See, e.g., Yonkers Comm. on Human Rights v. City of Yonkers, 654 F. Supp. 544, 553 (S.D.N.Y. 1987) ("It is well established that Constitutional due process rights do not inhere in municipal corporations as against the state of their creation. A municipal corporation may not assert a denial of the equal protection or due process clauses of

the Fourteenth Amendment as against the state by which created, and therefore, a department which is an arm or agency of a unit of state government, is not protected against the acts of the state or other entities exercising state delegated authority."); City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973); Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2d Cir. 1973); Delta Special Sch. Dist. No. 5 v. State Bd. of Educ. for the State of Arkansas, 745 F.2d 532, 533 (8th Cir. 1984); South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500, 505 (6th Cir. 1986). n5 Accordingly, the District's due process claim must be rejected. n6

B. IDEA Claims

The District claims that SRO Munoz's order of tuition reimbursement to the Schutzes during the pendency of the ongoing dispute over its proposed IEP for Kevin Schutz violates the IDEA. Plaintiff's IDEA claim focuses upon the apparent conflict between Section 1412(c) and 1415(j) of that statute. For the reasons that follow, plaintiff's argument is rejected and its IDEA claim is dismissed.

Section 1415(j) contains what is known as the IDEA's "pendent placement" or "stay put" provision. See Susquenita School District v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996). The "pendent placement" provision provides, in pertinent part: "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then-current educational placement of such child." 20 U.S.C. § 1415(j).

The District argues that this "stay put" provision of Section 1415(j) must be read in conjunction with Section 1412(c). Section 1412(c)(i) states, in relevant

part, that the IDEA "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school . . . if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school."

The State defendants' opposition focuses upon two arguments: first, that the express language of the IDEA and its associated regulations requires the tuition reimbursement at issue; and second, that neither NYSED nor SRO Munoz are proper parties under the IDEA. The individual defendants argue that the complaint must be dismissed because plaintiffs sue under Section 1404 of the IDEA, which has no relevance to the instant action. n7

1. Proper Parties Under the IDEA

The State defendants argue for dismissal of the instant complaint on the grounds that neither NYSED nor SRO Munoz are proper parties to this action. This argument is rejected.

As to NYSED, it is clear that it is a proper party to the instant action. The Southern District of New York decision in Mr. "X" v. New York State Dept. of Educ., 975 F. Supp. 546 (S.D.N.Y. 1997), is instructive on this point. In Mr. "X", the court observed that, under New York's prior administrative scheme (wherein the Commissioner of Education acted as the review officer), there was no question that NYSED was a proper party to a review of the Commissioner's decision. Id. at 553 (citing Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y. 1994)). The court then reasoned, "if the Commissioner acting as SRO . . . once subjected SED to a judicial proceeding reviewing such a decision, it seems only logical that the SRO, appointed by the SED to make the same determinations, subjects SED to this court's

jurisdiction." Id. This reasoning is adopted. NYSED is a proper party to the instant action.

SRO Munoz is a proper party to the instant action for the same reason. In Mavis, the Honorable Neal McCurn of the Northern District of New York held that the Commissioner of Education was a proper party to an action seeking review of his decision. Id. at 976-77. If the Commissioner could be haled into court to defend his review decision under the prior administrative scheme, there is no reason to conclude that a different result should follow because the State has chosen to delegate this authority to a State Review Officer. n8

2. Merits of the IDEA Claim

The basic purpose underlying the IDEA is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). n9 Toward that end, the IDEA allows states to receive federal funding provided that their educational programs comply with not only the Act's substantive requirements, but also the procedural safeguards that the IDEA extends to children with disabilities and their parents. These procedural safeguards are meant to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think are inappropriate." Honig v. Doe, 484 U.S. 305, 311-12, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988).

In New York, parents who object to an IEP may request an "impartial due process hearing" before a hearing officer. N.Y. Educ. Law § 4404. Any party aggrieved by the hearing officer's decision may then appeal that decision to the State Review Officer. Id. When a final administrative decision has been rendered,

a dissatisfied party then has the right to bring a civil action in either federal or state court. 20 U.S.C. § 1415(i)(2). n10

Parents who "unilaterally changes their child's placement during the pendency of [the above] review proceedings, without the consent of state or local school officials, do so at their own financial risk." School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass., 471 U.S. 359, 373-74, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). When parents reject an IEP and remove their children from public school without the consent of school officials, they are therefore required to pay any tuition expense incurred as a result of such unilateral placement. See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 357-58 (S.D.N.Y. 1999). However, if the parents are ultimately successful in the review proceedings, the IDEA permits the retroactive recovery of any tuition expenses. Burlington, 471 U.S. at 372.

This is so because, as the Supreme Court observed in Burlington, the administrative decision in favor of the parents "would seem to constitute an agreement by the State to the change of placement." Id. Therefore, once the parents receive an administrative decision in their favor, the student's "current educational placement" changes in accordance with that decision. See 34 C.F.R. § 300.514(c). n11 Moreover, a favorable administrative decision as to placement implies an agreement to pay for such placement. Murphy, 86 F. Supp. 2d at 357, 366; Susquenita, 96 F.3d at 84.

The Southern District of New York recently considered a similar case involving the Kildonan School. In that case, the court held that:

> Once the SRO rendered its decision, there was an 'agreement' changing [the student's] pendent placement to Kildonan. From that date forward, the District is responsible maintaining that placement. 'To hold otherwise would mean that parents who could not afford a private placement would be forced to maintain their child in a public placement that an administrative decision held to be inappropriate. This would contravene the purpose of the stay-put provision.'

Murphy, 86 F. Supp. 2d at 366 (quoting Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 10 F. Supp. 2d 971, 977 (N.D. Ill. 1998)).

In the instant case, the last final administrative ruling as to the current educational placement of Kevin occurred in September of 1997. That decision by an impartial hearing officer, which became final and binding upon the District following its unsuccessful appeal on the grounds of laches, fixed Kildonan as the current educational placement of Kevin Schutz. This ruling has yet to be supplanted by a final administrative decision altering Kevin's placement, and the parties have, by intervening agreements, maintained Kildonan as his "current educational placement." The District is therefore obligated to continue Kevin's placement at Kildonan until it is changed in accordance with the IDEA. See, e.g., Jacobsen v. District of Columbia Bd. of Educ., 564 F. Supp. 166, 171-72 (D.D.C. 1983); Murphy, 86 F. Supp. 2d at 360; Susquenita, 96 F.3d at 86-87. Accordingly, the District is required to comply with the March 16, 2000, decision of SRO Munoz ordering it to pay for Kevin Schutz's placement at Kildonan during the pendency of the ongoing administrative review.

The District argues that the foregoing analysis ignores the statutory mandate of Section 1412(c). 20 U.S.C. § 1412(c). Its argument is that Section 1412(c) imposes a requirement upon the State that as a precondition of ordering the payment of tuition for private school, the IEP currently proposed by the school district must be found to be inadequate. Under plaintiffs interpretation of the statute, regardless of whether a student is currently receiving tuition reimbursement for attendance at a private school, the mere proposal of a new IEP for a disabled student for a new school year abrogates the application of the "stay put" provision for that academic year. Plaintiff's interpretation cannot be accepted.

It is a basic tenet of statutory construction that statutes should be read in a manner, if possible, that will give effect to all of their provisions. United States v. Gitten, 231 F.3d 77, 80 (2d Cir.2000) (quoting United States v. Menasche, 348 U.S. 528, 538-39, 99 L. Ed. 615, 75 S. Ct. 513 (1955)). In the instant case, if the interpretation proffered by plaintiff is accepted, it would effectively render the language of the "stay put" provision, as well as its implementing regulations, meaningless. This is so because, if plaintiff's interpretation were accepted, a school district could avoid application of the "stay put" provision simply by proposing a new IEP. If a pendency placement could be so easily avoided, then Section 1415(j) would have little, if any, practical significance. n12

The better interpretation of these sections is that the provisions of Section 1412, providing for the obligation of a school district to pay private school tuition only upon a finding that it has failed to offer a FAPE to a disabled student, is addressed to the situation where the parents have not yet successfully challenged a proposed IEP. As noted above, once such a challenge is

successful, consent to the private placement is implied by operation of law. n13

This result is in accord with the overall scheme of the IDEA. Section 1415(j) represents "Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." Susquenita, 96 F.3d at 83 (quoting Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864-65 (3d Cir. 1996)). In light of the protective purpose of Section 1415(j), it would be unwise to interpret the IDEA in such a manner as to render the "stay put" provision largely irrelevant. Accordingly, the District's proposed interpretation of Section 1412(c) cannot be accepted, and defendants are correct that plaintiff has failed to state a claim for relief under the IDEA.

C. Request for Injunctive Relief

The Schutzes have requested that the District be ordered to continue to pay their son's tuition at Kildonan during the pendency of the ongoing dispute over the proposed IEP. n14 Because Kildonan is the current educational placement of Kevin, this result is mandated by Section 1415(j).

The Second Circuit has described the operation of Section 1415(j) as an "automatic preliminary injunction." Zvi D. by Shirley D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). In other words, once the parents prove their child's current educational placement (whether it be in public or private school), the local educational agency is then required to maintain that placement under the IDEA. While it is true that, on the facts of this case, the result is to impose a "significant financial burden on the States and school districts that participate in IDEA," Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15,

126 L. Ed. 2d 284, 114 S. Ct. 361 (1993), it is the result mandated under that statute. Because the current educational placement of Kevin Schutz is Kildonan, the District is required to continue to reimburse the Schutzes for the cost of tuition during the pendency of the instant dispute. n15

V. CONCLUSION

After careful consideration of the submissions of the parties, the relevant parts of the record, and the applicable law, it is hereby

ORDERED that

1. Defendants' motions are GRANTED;

2. The complaint is DISMISSED;

3. Plaintiff Board of Education of the Pawling Central School District is hereby directed to immediately comply with the March 16, 2000, decision of Frank Munoz, the State Review Officer of the State Department of Education of the State of New York, and to continue to comply with the pendent placement provision of 20 U.S.C. § 1415(j), as interpreted herein; and

4. Jurisdiction is retained to ensure compliance with the above directive.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

David N. Hurd

United States District Judge

Dated: April 2, 2001

Utica, New York.

Footnotes

n1 The only fact which appears to be in dispute is whether or not the District is currently "operating in contempt of" the decision of SRO Munoz ordering the prospective payment of tuition to the Schutzes. See Norlander Affidavit in Opposition to Cross Motion to Dismiss and For an Injunction at P 10; Charpentier Affidavit on Motion to Dismiss the Complaint and Cross-Motion For Injunctive Relief at P 6 (the "Charpentier Affidavit"). However, this dispute is not relevant to the resolution of the instant motion.

n2 Subsequent to the commencement of this action, in a decision dated August 17, 2000, the impartial hearing officer found that the District had made a FAPE available to Kevin Schutz for the 1999-2000 school year, and that the Schutzes had improperly rejected the District's IEP. This decision is currently being appealed by the Schutzes to SRO Munoz.

n3 The plaintiff correctly points out that, because the Schutzes have answered the instant complaint, their motion is properly brought under Rule 12(c) rather that Rule 12(b)(6). However, because the standard of review is the same under either provision, this error is harmless and their motion will be considered as though it had been brought under Rule 12(c).

n4 In addition, defendants argue that SRO Munoz is entitled to absolute and/or qualified immunity as a "quasi-judicial" official. Because SRO Munoz is sued only in his official capacity, and is accordingly entitled to Eleventh Amendment immunity, it is not necessary to decide this question.

n5 The State defendants argue that this claim must be dismissed because the plaintiff has failed to identify the deprivation of any private property, citing Wenger v.

Canastota Central School Dist., 979 F. Supp. 147, 153 (N.D.N.Y. 1997), aff'd 208 F.3d 204 (2d Cir. 2000). This argument misses the fundamental fact that the District lacks standing to invoke the protections of the Fourteenth Amendment as against the State of New York.

n6 In addition, the individual defendants move to dismiss the Section 1983 claim against them on the grounds that they are not state actors; however, it is clear from the complaint that the Section 1983 claim is pleaded solely against the State defendants.

n7 Section 1404 of the IDEA deals with the acquisition of equipment and the construction or alteration of facilities. 20 U.S.C. § 1404. Counsel for plaintiff has previously informed the Schutzes' attorney that the reference to Section 1404 is merely a typographical error. See Norlander Affidavit at P 16. Accordingly, the individual defendants' motion will be disregarded to the extent that it argues for dismissal on this basis.

n8 This result is in accordance with outcome which would obtain under New York law. Were this action brought pursuant to Article 78 of the New York Civil Practice Law and Rules, there is no question that SRO Munoz would be a proper party. See N.Y. C.P.L.R. § 7802(a) (defining "body or officer" against whom proceedings under Article 78 are authorized to include "every court, tribunal, . . . officer, or other person . . . whose action may be affected by a proceeding under this article."). See also In re Beau II, 95 N.Y.2d 234, 239, 715 N.Y.S.2d 686, 738 N.E.2d 1167 (2000).

n9 A "free appropriate public education" under the IDEA is one that is "provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(8).

n10 Section 1415(i)(2), 20 U.S.C. § 1415(i)(2), of the IDEA provides in relevant part:

Any party aggrieved by the findings and decision made under subsection ... shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

n11 34 C.F.R. § 300.514(c) states:

If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [the stay put provision].

n12 It has been suggested that Section 1415(j) was only intended to prevent the removal of a student during the school year for which the proposed IEP was rejected. This argument finds no support in either the statute or the case law. Murphy, 86 F. Supp. 2d at 358-61.

n13 The title of Section 1412(c) supports this conclusion. Section 1412(c) is entitled, "Payment for education of children enrolled in private schools without consent of or referral by the public agency." As discussed above, the obligation to pay for such students

is imposed by Section 1415(j) when a student is placed in a private school by the "agreement" of the parents and the state. In such a case, the "consent" of the public agency is inferred from the prior determination. Under this view, Section 1412(c) is inapplicable to the instant case because, through its unsuccessful administrative appeal in 1997, the District has "consented" to the placement of Kevin at Kildonan.

n14 The Charpentier Affidavit also contains a demand for attorneys fees pursuant to 20 U.S.C. § 1415. However, the Schutzes have offered no argument in support of this demand, and it is therefore denied.

n15 Although it is not necessary to decide this issue on the instant motions, an additional point warrants brief discussion. The State defendants have asserted that the District would be entitled to recoup any payments made under the "stay put" provision if it is ultimately successful on its claim that its proposed IEP is appropriate. See Memorandum of Law in Support of Motion to Dismiss State Defendants at 1. There is some doubt concerning the accuracy of this statement, at least as applied to the Schutzes. While several courts have declined to reach this issue, see Susquenita, 96 F.3d at 87; St. Tammany Parish Sch. Bd. v. Louisiana, 142 F.3d 776, 789 (5th Cir. 1998), in Clovis Unified Sch. Dist. v. California Office of Administrative Hearings, 903 F.2d 635, 641 (9th Cir. 1990), the court held that the cost of a child's "stay put" placement must be borne by the school district and the state.

Accordingly, it appears as though the tuition payments made by the District during the pendency of this appeal may not be subject to recoupment from the Schutzes, and no opinion is offered as to the manner in which this burden might be allocated between the District and the State.

No. 01-7541
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of September two thousand two.

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,
Plaintiff-Counter-Defendant-Appellant,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ,
Defendants-Counter-Claimants-Appellees,

STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of the State Education Department of the State of New York,
Defendants-Appellees.

Filed 9/18/02

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Pawling Central School District.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote he taken thereon.
FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:
Arthur M. Heller, Administrative Attorney

The University of the State of New York

The State Education Department
State Review Officer

No. 99-100

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Pawling Central School District

Appearances:
Family Advocates, Inc., attorney for petitioners, RosaLee Charpentier, Esq., of counsel

Ruberti, Girvin and Ferlazzo, P.C., attorney for respondent, Karen Norlander, Esq., of counsel

DECISION

Petitioners appeal from an impartial hearing officer's interim decision which held that their son's pendency placement during a proceeding brought to obtain an award of tuition reimbursement for the 1999-2000 school year was in respondent's schools, rather than in the private school which the boy has attended since 1995. The appeal must be sustained.

Petitioners' son was initially classified as learning disabled by respondent's committee on special education (CSE) in 1993, when the boy was in first grade in respondent's elementary school. In accordance with the CSE's recommendation, he received resource room services and counseling during the remainder of the

1992-93 school year, as well as the 1993-94 and 1994-95 school years. For the 1995-96 school year, the CSE recommended that the boy be placed in an "inclusion" class with a full-time assistant, additional reading instruction and counseling. Petitioners were dissatisfied with the CSE's recommendation, and placed their son in the Kildonan School, a private school in Amenia, New York. The Kildonan School serves children with reading and writing disabilities, but it has not been approved by the State Education Department as a school for children with disabilities. The child remained at Kildonan for the 1996-97 school year.

At petitioners' request, an impartial hearing was held in the spring of 1997. Petitioners sought an award of tuition reimbursement for the 1995-96 and 1996-97 school years. The Board of Education conceded that it did not have an appropriate educational program for the child during the 1995-96 and 1996-97 school years. The hearing officer found that the Kildonan School had provided appropriate special education services to the child, and that petitioners' claim for tuition reimbursement was supported by equitable considerations. He ordered respondent to reimburse petitioners for their tuition expenditures during both school years.

Respondent appealed from the haring officer's decision. Its appeal was limited to the issue of whether the hearing officer had erred in rejecting the Board of Education's contention that petitioners' claim for tuition reimbursement should be barred by the equitable doctrine of laches because petitioners had unreasonably delayed in requesting an impartial hearing. In Application of a Child with a Disability, Appeal No. 97-79, I found that the Board of Education was on notice of petitioners' dissatisfaction with their son's educational

program in the school district well before petitioners requested the impartial hearing, and that their requests for reimbursement were timely. On September 10, 1998 I dismissed the Hoard of Ed u cation's appeal.

The Board of Education did not seek judicial review of my decision, which therefore finally determined petitioners' right to obtain tuition reimbursement for the 1995-96 and 1996-97 school years. It did reimburse petitioners for their tuition expenditures for those school years. The boy attended the Kildonan School for the 1997-98 school year. Respondent's CSE had prepared an individualized education program (IEP) for that school year, which petitioners rejected. Petitioners requested that an impartial hearing be held. In a written stipulation which is annexed to the petition in this appeal as Exhibit C, the parties agreed that petitioners would withdraw their hearing request, and that respondent would pay petitioners the sum of $15,000. The stipulation, which was agreed to in January, 1998 prior to my decision in Appeal No. 97-79, also provided that petitioners would cooperate with respondent and its CSE in the latter's annual review of the boy and preparation of his IEP for the 1998-99 school year. The stipulation did not refer to the Kildonan School, or to any placement for petitioners' son for either the 1997-98 or 1998-99 school year.

Respondent's CSE prepared an IEP for the 1998-99 school year. Petitioners objected to that IEP, and they requested a hearing on August 14, 1998. In a stipulation dated September 15, 1998, the parties agreed that petitioners would withdraw their hearing request, and that respondent would pay them $16,500 (Exhibit D to the petition). The stipulation explicitly provided that:

"1. The District shall make reimbursement payment to the parents in the amount of sixteen thousand five hundred ($16,500) dollars based upon: the deficiencies in the District's 1998-99 IEP placement, the unilateral parental placement of the student in the Kildonan School for the 1998-1999 school year and for any and all attorneys' fees arising from this proceeding. Said payment shall be made on or before October 15, 1998.

2. The Complainants shall forebear from bringing any further administrative and/or legal proceedings against the Pawling Central School District, its Board of Education, its employees, it agents, and their successors regarding any claim pursuant to the Individuals with Disabilities Education Act (IDEA), (20 U.S.C. § 1400 et seq.), Article 89 of the New York State Education Law and their implementing regulations for all times past including the 1998-1999 school year regarding their son [the child's name], provided however, that this release from legal liability shall not apply to proceedings presently pending between the parties based upon tuition reimbursement claims for the unilateral parental placement of Kevin in a private school not on the State's approved school list for the 1995-1996 and 1996-1997 school year IEP's."

On June 23, 1999, respondent's CSE reportedly prepared the boy's IEP for the 1999-2000 school year. The IEP, which is not in the record which is before me,

reportedly provided for a placement in respondent's middle school. Petitioners did not accept the IEP. On August 22, 1999, they requested an impartial hearing for the purpose of obtaining an award of tuition reimbursement for the 1999-2000 school year.

The hearing began on September 29, 1999. In her opening statement, petitioners attorney asked the hearing officer to issue an interim decision regarding the boy's pendency placement, for the purpose of determining respondent's financial responsibility, if any, for the boy's tuition at and transportation to the Kildonan School during the proceeding. The parties resolved the issue of transportation, and they agreed that the hearing officer should render an interim decision regarding the boy's pendency placement. It was agreed that he would do so on the basis of the facts and legal arguments which the parties would submit to him by no later than October 5, 1999. I note that the parties' submissions to the hearing officer are not part of the record before me, but the parties have annexed copies of the relevant factual documents to their pleadings.

In his interim decision dated November 5, 1999, the hearing officer noted that pursuant to the pendency provisions of the IDEA,

> ". . . unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed" (20 USC 1415 [j]).

The hearing officer also noted that the term "current educational placement" meant the last mutually agreed upon placement for the child as of the moment when a due process proceeding is commenced. He found that the last mutually agreed upon placement for petitioners' son was in respondent's schools during the 1994-95 school year, prior to the first of the impartial hearings requested by petitioner. The hearing officer referred to a recent amendment to the Federal regulations with regard to pendency placements. On May 11, 1999, a new 34 CFR 300.514 (c) was added to provide that:

> "If the decision of a hearing officer in a due process hearing conducted by the SEA or State Review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section".

The hearing officer concluded that the new regulation did not afford a basis for concluding that the Kildonan School had become this child's pendency placement.

Petitioners argue that the two stipulations between the parties with respect to the payment of tuition for the 1997-98 and 1998-99 school years, respectively, must be construed as agreements to have the boy educated at the Kildonan School, thereby changing his pendency placement from respondent's schools to the Kildonan School. They contend that I should infer that there was an agreement as to placement from the fact that the stipulations did not explicitly provide that they were limited solely to paying the boy's tuition. Although the September 15, 1998 stipulation expressly referred to the

boy's unilateral placement at the Kildonan School, I find that the stipulation was a financial settlement of petitioners' claims against the district with respect to a specific period of time. As such, neither that stipulation nor its predecessor may be viewed as a mutual agreement to place the boy in the private school (Application of a Child with a Disability, Appeal No. 98-25).

Petitioners contend that the decision awarding them tuition reimbursement for the 1995-96 and 1996-97 school years constitutes an agreement by the State Education Department that the Kildonan School was an appropriate placement for the boy, and that the private school became their son's pendency placement.

Respondent opposes petitioners' request for a finding that their son's pendency placement is in the Kildonan School. It argues that petitioners must establish their eligibility to receive an award of tuition reimbursement in accordance with the criteria set forth in the U.S. Supreme Court decisions in School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 (1985) and Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). The Board of Education contends that my decision in Appeal No. 97-19 awarding petitioners the relief of tuition reimbursement in accordance with the three-pronged test which the Supreme Court established in its Burlington and Carter decisions did not involve an agreement by either the Board of Education or the New York State Education Department to change the boy's placement to the Kildonan School. Instead, it was simply a permissible remedy for rectifying a violation of the IDEA and its State counterpart, Article 89 of the Education Law, for two particular school years.

Respondent relies in part on previous decisions of the State Review Officer holding that an award of tuition reimbursement did not change a child's pendency placement (Application of a Child with a Disability, Appeal No 96-83, Application of a Child with a Disability, Appeal No 96-92, Applications of the Board of Education of the Albion. CSD and a Child with a Disability, Appeal Nos. 97-42 and 43; Application of the Board of Education of the Northeastern CSD, Appeal No. 97-76; and Application of the Board of Education of the Wappingers CSD, Appeal No. 97-82). The holding in those decisions was that a tuition award is not a determination that a student should be placed in a particular school. Those decisions were premised upon the fact that the IDEA required that each publicly placed student receive special education services which meet the standards of the State educational agency (former 20 USC 1412 [6], now 20 USC 1412 [a] [11] [A] [ii] [11]). Private schools which wish to accept publicly placed students must comply with various regulations of the State Education Department, e.g. 8 NYCRR 200.7, 200.9, 200.4, and 200.15, and be approved by the Department. Those requirements do not, however, apply to the private schools in which children have been unilaterally placed by their parents, when the parents seek to obtain an award of tuition reimbursement (Florence County School District Four et al. v. Carter by Carter, supra; 34 CFR 300.403 [c]). Therefore, the prior decisions by the State Review Officer have held that a decision by an impartial hearing officer or the State Review Officer to award tuition reimbursement to the parents of a child who has been unilaterally placed in a private school by the parents should not be construed as either a school district or State Education Department determination to place the child in that school, thereby changing the child's placement to the private school.

The 1997 IDEA amendments did not change the wording of the IDEA pendency provisions (see former 20 USC 1415 [c] [3] [A] and present 20 USC 1415 [j]). Nevertheless, the new Federal regulations include the provision in 34 CFR. 300.514 (c), which is set out above, that when the State Review official in an administrative appeal "agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents" for purposes of pendency. In its explanation for the new regulation, the U.S. Department of Education indicated that:

> "Paragraph (c) is based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See e.g., Burlington School Community v. Dept. of Educ., 471 U.S. 359, 371 (1985); Susquenita School District v. Raelee S., 96 F. 3d 78, 84 (3rd Cir. 1996): Clovis Unified v. 903 F. 2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under § 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency while an appeal is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is

appropriate." (Federal Register, Vol. 64, No. 48, Friday, March 12, 1999, page 12615).

Respondent Board of Education contends that the new 34 CFR 300.514 (e) was intended to apply for the duration a school district's appeal from a specific State Review Officer's decision upholding the parents' position to the courts. It asserts that the new regulatory language does not apply at the beginning of a new proceeding to obtain tuition reimbursement, such as this proceeding. In effect, the child's pendency placement would have been the Kildonan School, if respondent had sought judicial review of the decision in Appeal No. 97-79. Since the Board of Education did not appeal from that decision, it argues that the boy's pendency placement continued to he the last mutually agreed upon placement, which occurred in 1994 when he attended respondent's schools.

Having considered the express terms of the new 34 CFR 300.514 (c), as well as the explanation published in the Federal Register, I cannot accept respondent's argument. Although the phrase "agrees with the child's parents that a change of placement is appropriate" is not as precise as it might have been, I find that it was intended to include an award of tuition reimbursement because the three decisions which were referenced in the Federal Register explanation all involved tuition claims. Pursuant to the new regulation, a tuition reimbursement decision by the State Review Officer becomes an agreement by the State and the parents concerning the child's placement. It therefore becomes the child's last mutually agreed upon placement for purposes of pendency in a subsequent proceeding, unless the parties agree upon another placement (Murphy v. Arlington Central School District, _F. Supp 2d , 2000 WL 245915 [S.D.N.Y., 2000]). In this instance,

the boy's last mutually agreed upon placement when petitioners initiated this proceeding was the Kildonan School, by virtue of my decision in Appeal No. 97-79. Therefore, I must depart from the previous decisions of the State Review Officer regarding pendency placements, and order that respondent pay for the boy's tuition at the Kildonan School during the pendency of the proceeding brought with respect to the 1999-2000 school year.

IT IS ORDERED that the hearing officer's decision is hereby annulled; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioners for their expenditures for their son's tuition at the Kildonan School during the pendency of the proceeding brought concerning the boys educational placement for the 1999-2000 school year, upon petitioners' presentation of proof of payment for such tuition.

Dated: Albany, New York March 16, 2000

FRANK MUNOZ

No: 00-CV-1105

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

BOARD OF EDUCATION OF THE PAWLING
CENTRAL SCHOOL DISTRICT,
Plaintiff-Counter-Defendant-Appellant,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ,
Defendants-Counter-Claimants-Appellees,

STATE EDUCATION DEPARTMENT OF THE STATE
OF NEW YORK, FRANK MUNOZ, as the State Review
Officer of the State Education Department of the State
of New York,
Defendants-Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that THE BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT, plaintiffs in the above referenced case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final decision and order entered in this action on the 3rd day of April, 2001.

Dated: April 26, 2001

RUBERTI, GIRVIN & FERLAZZO, P.C
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No: 00-CV-1105

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

BOARD OF EDUCATION OF THE PAWLING
CENTRAL SCHOOL DISTRICT,
Plaintiff-Counter-Defendant-Appellant,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ,
Defendants-Counter-Claimants-Appellees,

STATE EDUCATION DEPARTMENT OF THE STATE
OF NEW YORK, FRANK MUNOZ, as the State Review
Officer of the State Education Department of the State
of New York,
Defendants-Appellees.

COMPLAINT

For its complaint plaintiff alleges

INTRODUCTION

1. This is an action for declaratory and monetary relief to redress violations by the defendants of the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 1401 et. seq. and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The action arises from an order issued by defendant Frank Munoz, a State Review Officer of the New York State Education Department, which ordered the plaintiff to pay tuition reimbursement prospectively in the amount of $21,500 to defendants Steven Schutz and Yvonne Schutz, before a decision on the merits to

determine whether or not plaintiff is liable for such tuition reimbursement for a private non-approved school. Plaintiff seeks declaratory relief, monetary relief, injunctive relief, equitable relief and attorney's fees pursuant to the IDEA and 42 U.S.C. 1983 and 1988.

JURISDICTION

2. This Court has federal question jurisdiction over this action under 28 U.S.C.§ 1331; this Court has jurisdiction over civil actions under the IDEA by 20 U.S.C.§ 1415(i)(B)(2); this Court has jurisdiction over Defendant New York State Education Department under 20 U.S.C. §1403(a).

VENUE

3. Venue in this District is proper under 28 U.S.C. § 1391(b). The Northern District of New York is the judicial district in which the events, acts and omissions giving rise to the claims occurred.

PARTIES

4. Plaintiff Board of Education of the Pawling Central School District ("Plaintiff or "the District") maintains offices at 7 Haight Street, Pawling, New York 12564.

5. Plaintiff is a corporate body, duly organized and existing under New York State Education Law §1601.

6. Defendants, Steven Schutz and Yvonne Schutz, reside at 44 Pawling Lake Estates, Pawling, New York 12564.

7. Defendant the State Education Department of the

State of New York ("NYS ED") maintains offices at 99 Washington Avenue, Albany, New York 12234.

8. Defendant Frank Munoz is a State Review Officer for NYSED and maintains an office at 1450 Western Avenue, Albany, New York 12203.

FACTS

9. Defendant State Education Department is New York's State Educational Agency ("SEA") as defined by the IDEA. 20 U.S.C. § 140 1(28).

10. Plaintiff Board of Education of the Pawling Central School District is a Local Educational Agency ("LEA") as defined by the IDEA. 20 U.S.C. § 1401(15).

11. Defendant NYSED, the New York State SEA, receives federal funds under the IDEA to provide, among other things, general supervision to ensure that the requirements of the IDEA are met, and to have in effect policies and procedures that ensure that parents and children with disabilities are afforded the procedural safeguards of the Act and that reimbursement for unilateral private school tuition is awarded only upon a finding of a court or a hearing officer that the district failed to make a free appropriate public education available to the child in a timely manner. 20 U.S.C. § 1412.

12. Defendant Frank Munoz, a State Review Officer ("SRO") for NYSED, was duly appointed pursuant to New York State Education Law § 4404 and 8 NYCRR § 279 and issued the order that plaintiff reimburse defendants, Steven and Yvonne Schutz, for Kevin's tuition at Kildonan for the 1999-2000 school year which

is the subject of this appeal.

13. Under the IDEA, the District is required to develop an Individualized Education Program ("IEP") annually for each resident student identified as having a disability. 20 U.S.C. § 1414 (d)(2).

14. Kevin Schutz ("Kevin) is the son of Defendants Steven and Yvonne Schutz, and is a resident student in the Pawling Central School District.

15. In 1993, Kevin was identified as a student with a learning disability by plaintiff's Committee on Special Education ("CSB").

16. Plaintiff's CSE recommended an IEP in the District's School for Kevin for the 19931994 school year.

17. The student attended plaintiff's public schools pursuant to the district's IEP for both the 1993-1994 and 1994-1995 school years.

18. In September 1995, defendants Steven and Yvonne Schutz rejected the District's 1995-1996 school year IEP and unilaterally enrolled Kevin at the Kildonan School ("Kildonan").

19. Kildonan is a private school that exclusively serves students with learning disabilities in reading, also referred to as dyslexia.

20. Kildonan is not approved by defendant NYSED to provide special education and related services for students with disabilities.

21. Because the Kildonan School is not approved by the NYSED to provide special education and related

services to students with disabilities, plaintiff is not authorized to place Kevin at the Kildonan School.

22. Because the Kildonan School is not approved by the NYSED to provide special education and related services to students with disabilities, defendant Frank Munoz is not authorized to place Kevin at the Kildonan School.

23. Because the Kildonan School is not approved by the defendant, State Education Department to provide special education and related services to students with disabilities, plaintiff is not eligible under state law to obtain any reimbursement from defendant, the State Education Department, for the cost of Kevin's tuition.

24. Throughout the 1995-1996 and 1996-97 school years, the District and Kevin's parents worked together in an effort to reach an agreement regarding Kevin's placement; no agreement was reached.

25. Defendants Steven and Yvonne Schutz enrolled their son, Kevin, at the Kildonan School for the 1996-1997 school year.

26. Defendants Steven and Yvonne Schutz requested an impartial hearing in April 1991, seeking tuition reimbursement for their son's attendance at Kildonan for both the prior 1995-1996 school year and the then current 1996-1997 school year.

27. An impartial hearing officer rendered a decision on September 4, 1997 awarding defendants Steven and Yvonne Schutz reimbursement for the 1995-1996 and 1996-1997 school years.

28. The hearing officer based his decision on his

findings that the Kildonan placement was appropriate under the IDEA and that the equities did not bar a claim for reimbursement.

29. The District appealed the impartial hearing officer's decision to the SRO.

30. The SRO was not presented with the issue of the merits of the District's IEP. The sole issue raised by the District on appeal was whether the equities barred an award of tuition reimbursement for the two years, based on the parents' alleged delay in initiating due process proceedings.

31. The State Review Office issued its decision on September 8, 1998, dismissing the District's appeal based on its finding that the parents' request for a hearing was timely. A copy of the decision of the SRO is attached to the complaint as Exhibit "A".

32. Plaintiff's CSE recommended an IEP for Kevin for the 1997-98 school year to be implemented in the District's public school.

33. Defendants Steven and Yvonne Schutz disagreed with the IEP proposed by the District's CSE for the 1997-1998 school year.

34. Defendants Steven and Yvonne Schutz enrolled their son Kevin at the Kildonan School for the 1997-98 school year.

35. Defendants Steven and Yvonne Schutz requested an impartial hearing to obtain reimbursement from plaintiff for Kevin's tuition at the Kildonan School for the 1997-98 school year.

36. At the time defendants' Steven and Yvonne Schutz requested a hearing to obtain reimbursement for Kevin's tuition for the 1997-98 school year, the parties had not received a decision from the impartial hearing officer regarding defendants' request for tuition reimbursement for the 1995-96 and 1996-97 school years.

37. By written stipulation of settlement, the District reimbursed defendants, Steven and Yvonne Schutz, $15,000 for Kevin's tuition at Kildonan for the 1997-98 school year. A copy of the stipulation is attached hereto as Exhibit "B".

38. Defendants Steven and Yvonne Schutz disagreed with the IEP proposed by the District's CSE for the 1998-1999 school year.

39. Defendants Steven and Yvonne Schutz enrolled Kevin at the Kildonan School for the 1998-99 school year.

40. On August 14, 1998, defendants Steven and Yvonne Schutz requested an impartial hearing and sought reimbursement from plaintiff for Kevin's tuition at Kildonan for the 1998-99 school year.

41. At the time defendants Steven and Yvonne Schutz requested a hearing to obtain reimbursement for Kevin's tuition for the 1998-99 school year, the parties had not received a decision from the State Review Officer on plaintiffs appeal of the decision of the impartial hearing officer regarding defendants' request for tuition reimbursement for the 1995-96 and 1996-97 school years.

42. On September 15, 1998, plaintiffs and Defendants Steven and Yvonne Schutz reached a written settlement of their dispute over the 1998-1999 school year.

43. By written stipulation, the District agreed to reimburse Steven and Yvonne Schutz in the amount of $16,500 for Kevin's tuition at the Kildonan School for the 1998-1999 school year. A copy of the stipulation is attached hereto as Exhibit "C".

44. In the stipulation settling the dispute over the 1998-1999 IEP, the parties agreed to work together to develop an appropriate IEP for the 1999-2000 school year.

45. Plaintiff's committee on special education ("CSE") convened on June 23, 1999, to develop an IEP for Kevin for the 1999-2000 school year.

46. The 1999-2000 IEP developed by the CSE offered Kevin individualized 1:1 reading instruction five times per week, counseling once a week, speech and language services three times a week and placement in a class with 12 students, a special education teacher and an aide.

47. The 1999-2000 IEP developed by plaintiffs CSE offered special education and related services in the district's public school where Kevin resides.

48. The 1999-2000 IEP is calculated to enable Kevin to receive educational benefit in the least restrictive environment necessary to meet his needs.

49. On August 22, 2000, defendants Steven and Yvonne Schutz requested an impartial hearing and sought reimbursement for Kevin's tuition at Kildonan for the 1999-2000 school year.

50. The impartial hearing commenced on September 28, 1999.

51. At the impartial hearing, plaintiff maintains inter alia that its recommended placement for the 1999-2000 school year is appropriate to meet Kevin's needs and that the Kildonan School is not proper under the Act, in that it serves only students with disabilities and is not least restrictive or appropriate to meet Kevin's needs.

52. Defendants Steven and Yvonne Schutz sought an interlocutory ruling from the impartial hearing officer declaring Kildonan as Kevin's "current educational placement" and ordering the District to pay Kevin's tuition prospectively pursuant to the pendency provision of the IDEA. 20 U.S.C. §1415(j).

53. On November 5, 1999, the impartial hearing officer issued an interim ruling denying defendants Steven and Yvonne Schutz' request for prospective tuition reimbursement fur the 1999-2000 school year during the pendency of their proceeding on the merits of their appeal.

54. Pursuant to State regulations which permit appeals of interim pendency rulings, defendants Steven and Yvonne Schutz appealed the hearing officer's ruling to defendant State Review Officer on or about December 23, 1999.

55. Defendant Frank Munoz issued his decision on March 16, 2000; Plaintiff received his Decision on March 11, 2000.

56. Defendant Frank Munoz sustained the appeal and ordered the District to reimburse defendants Steven and Yvonne Schutz prospectively for their son's tuition at the Kildonan School for the 1999-2000 school year.

57. The State Review Officer ruled that the IDEA's

pendency provision required prospective payment during the pendency of the proceeding upon defendants "submission of presentation of proof of payment for such tuition. A copy of the decision of the State Review Officer dated March 16, 2000 is attached hereto as Exhibit "D".

58. Defendants Steven and Yvonne Schutz provided the District with proof of payment in the amount of $21,500, on May 1, 2000.

59. The District issued defendants Steven and Yvonne Schutz a check for Kevin's tuition at the Kildonan School for the 1999-2000 school year in the amount of $21,500 on May 11, 2000, and put them on notice that the district planned to appeal the decision and would seek to

recoup the funds.

60. Under the IDEA, the District may be ordered to reimburse defendants Steven and Yvonne Schutz only upon a finding of a court or impartial hearing officer that: (1) the District failed to offer an appropriate IEP; (2) the parents' unilateral placement was proper under the IDEA; and (3) the equities support an award of reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.403.

61. To date, there is no finding by a court or impartial hearing officer with respect to the 1999-2000 school year whether the District failed to provide an appropriate IEP.

62. To date, there is no finding by a court or impartial hearing officer whether defendants unilateral enrollment of their son, Kevin, at Kildonan was

appropriate under the IDEA for the 1999-2000 school year

63. To date, there is no finding by a court or impartial hearing officer with respect to the 1999-2000 school year whether the equities support an award of tuition reimbursement to the defendants, Steven and Yvonne Schutz.

64. Since the time the impartial hearing began in September 1999 to determine whether defendants Steven and Yvonne Schutz were entitled to an award of to tuition reimbursement, defendants canceled four previously scheduled dates.

65. The final day of hearing regarding defendants Steven and Yvonne Schutz regarding their request for tuition reimbursement for the 1999-2000 school year is scheduled for July 19, 2000.

66. In the event plaintiff does not meet its burden of proof to establish that its 1999-2000 IEP before the impartial hearing officer was appropriate, or the hearing officer otherwise awards defendants Steven and Yvonne Schutz tuition reimbursement for the 1999-2000 school year, it intends to appeal the decision to the defendant State Review Officer.

67. Given the length of the pending hearing referred to above, a decision from the State Review Officer on defendants' claim for tuition reimbursement for the 1999-2000 IEP cannot be obtained before commencement the 2000-2001 school year.

68. In the interim and before the beginning of the school year, the District's CSE is obligated to convene an annual review and recommend an IEP for Kevin for

the 2000-2001 school year.

69. If defendants Steven and Yvonne Schutz request another impartial hearing seeking reimbursement from plaintiff for Kevin's tuition at the Kildonan School for the 2000-2001 school year, plaintiff anticipates that they will request prospective payment and demand tuition again during the pendency of their next appeal.

70. In accordance with the decision of defendant, Frank Munoz, if defendants Steven and Yvonne Schutz demand tuition from plaintiff for the 2000-2001 school year under the pendency provision of the IDEA, their claim may be made before a decision is issued by the impartial hearing officer on the merits of their claim for tuition reimbursement for the 1999-2000 school year and will be made before a final decision of the State Review Officer in the event of an appeal.

71. Plaintiff has no adequate remedy at law to recoup district funds paid pursuant to the erroneous interim order of defendant State Review Officer for Kevin's attendance in a non-approved school during the pendency of an appeal to determine whether the CSE recommended an appropriate IEP.

AS AND FOR A FIRST CAUSE OF ACTION

72. Plaintiff re-alleges and incorporates by reference all of the allegations contained in paragraphs "1" through "71" as if fully set forth herein.

73. The SRO, committed an error of law in applying the pendency provision to order plaintiff to pay prospective tuition reimbursement in violation of the IDEA.

74. Under the IDEA, a parent who unilaterally enrolls a child in a private school and seeks reimbursement for tuition does so at his/her own financial risk

75. The IDEA provides that nothing requires an LEA to fund a private school placement if the LEA made a free appropriate public education available to the student, and that only a hearing officer or court may require reimbursement for the cost of a parent's unilateral enrollment of a child in a private school if the court or hearing officer finds that the district had not made a free appropriate public education available to the child in a timely manner prior to that enrollment 20 U.S.C. § 1412(a)(10)(C).

76. The District has a right under the IDEA to a hearing and determination on the merits of its 1999-2000 IEP before it can be ordered to reimburse a parent for the student's tuition to attend a non-approved private school.

77. Defendants NYSED and State Review Officer Frank Munoz violated the federal statutory rights of the plaintiff by ordering prospective tuition reimbursement under color of state law before concluding a hearing on the merits of the District's 1999-2000 IEP and in the absence of a judicial or administrative determination that the plaintiff had not offered an appropriate IEP for the 1999-2000 school year.

78. The IDEA provides "a court or hearing officer may require [an LEA] to reimburse the parents for the cost of that enrollment [i.e. unilateral private school enrollment] if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child."

79. Defendant Prank Munoz under color of his authority as a State Review Officer, exceeded his authority under the IDEA and violated plaintiffs rights when he awarded tuition reimbursement to defendants Steven and Yvonne Schutz for the 1999-2000 school year without a determination on whether the district offered Kevin a free appropriate public education for the 1999-2000 school year.

80. Defendants Steven and Yvonne Schutz, the SRO, and/or NYSED are liable to plaintiffs for declaratory, monetary and equitable relief under § 1404 of the IDEA and 42 U.S.C.§ 1983. The State defendants are liable to plaintiff for attorney's fees pursuant to 42 U.S.C.§ 1988.

AS AND FOR A SECOND CAUSE OF ACTION

81. Plaintiff re-alleges and incorporates by reference all of the allegations contained in paragraphs "1" through "80" as if fully set forth herein.

82. By ordering plaintiff to make a prospective tuition payment to defendants Steven and Yvonne Schutz, without finding that the district failed to make a free and appropriate public education available for the 1999-2000 school year, defendant Munoz denied the plaintiff of its property and the use of its property during the pendency of the proceeding in which defendants seek tuition reimbursement, in violation of due process and the procedural safeguards of the IDEA. Even if the Board of Education is eventually able to establish that its placement was appropriate, there is no remedy at law to for the recovery of its funds.

83. Defendants, NYSED and Munoz deprived the plaintiff of its property and the use of its property without Due Process of Law, in violation of the

Fourteenth Amendment to the United States Constitution.

RELIEF

WHEREFORE, plaintiff respectfully prays that this Court:

A. Assume and retain jurisdiction over this action;

B. Vacate the order of the State Review Officer dated March 16, 2000.

C. Enter a declaratory judgment pursuant to 28 U.S.C.§ 2201 that defendant State Review Officer's order directing plaintiff to pay tuition prospectively, violated the procedural safeguards contained in the IDEA, 20 U.S.C.§ 1415 and implementing regulations at 34 C.F.R.

§ 300.403, and denied plaintiff the right to defend against the potential liability by establishing at a due process hearing that its 1999-2000 IEP was appropriate; that Kildonan is not appropriate under the IDEA, and that the equities do not support an award of tuition reimbursement.

D. Enter a declaratory judgment that the decision of the State Review Officer which required plaintiff to pay tuition prospectively in the absence of any order on the merits violated plaintiff's rights under Article 89 of the New York State Education Law, 20 U.S.C. § 1401 et seq. 42 U.S.C. § 1983, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

E. Grant equitable relief pursuant to the IDEA, ordering defendants Schutz to repay plaintiff the $21,500

they received improperly in view of defendant State Review Officer's erroneous decision.

F. In the alternative, grant equitable relief pursuant to the IDEA and 42 U.S.C. § 1983 ordering defendant State Education Department to reimburse plaintiff for $21,500 which plaintiff was required to pay to defendants Schutz pursuant to an order issued by defendant State Review Officer in violation of the IDEA.

G. Award plaintiff its costs, including reasonable attorneys' fees against defendants Munoz arid the NYSED pursuant to 42 U.S.C. § 1988; and

H. Award such other and further relief as this Court may deem just and proper.

Dated: July 17, 2000.
Respectfully submitted,

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20 U.S.C. §1412(a)(10) provides, in relevant part, as follows:

(B) Children placed in, or referred to, private schools by public agencies.

> (i)In general. Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part [20 U.S.C. §1411 et seq.] or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.
>
> (ii)Standards. In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency.

> (i)In general. Subject to subparagraph (A), this part [20 U.S.C. §1411 et seq.] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a

private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment **if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.**

20 U.S.C. §1412(a)(11) reads as follows:

(11) State educational agency responsible for general supervision.

(A) In general. The State educational agency is responsible for ensuring that–

(i) the requirements of this part [20 U.S.C. §1411 et seq.] are met; and

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency– (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency.

20 U.S.C. § 1415(j) reads as follows:

(j) Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1403 provides, in relevant part, as follows:

1403. Abrogation of State sovereign immunity (a) In general. A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this Act. (b) Remedies. In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

34 C.F.R. §300.514 reads as follows:

Child's status during proceedings.

(a) Except as provided in §300.526, during the pendency of any administrative or judicial

proceeding regarding a complaint under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

The Interpretive Comments to 34 C.F.R. §300.514 provide, in relevant part, as follows:

"Paragraph (c) is based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See e.g., Burlington School Community v. Dept. of Educ., 471 U.S. 359, 371 (1985); Susquenita School District v. Raelee S., 96 F. 3d 78, 84

(3rd Cir. 1996); Clovis Unified v. Office of Administrative Hearings, 903 F. 2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under § 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency while an appeal is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate."

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